OUTLINES
OF
Personal Property

W. E. LEAR

OUTLINES
OF THE LAW OF
PERSONAL PROPERTY
FOR THE USE OF STUDENTS

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PREFACE.

The basis of these outlines of the law of Personal Property was cribbed from "An Analysis of Williams on Personal Property," by A. M. Wilshere, M.A., LL.B., a gentleman who has extended many a kindness to law students by the preparation of analyses of several text books on English Law.

The Canadian law student is required to read English texts on the subject of Personal Property because there is no Canadian work on the subject; and while both Williams and Goodeve have produced excellent texts for the English law student, still the law of Personal Property is so largely statutory that the Canadian student experiences considerable difficulty in finding these enactments in our statutes; and the hope that these outlines will help to alleviate that difficulty is my only apology.

W. E. LEAR.

2nd February, 1920.

OUTLINES

OF THE

LAW OF PERSONAL PROPERTY

CHAPTER 1.

THE OBJECTS AND NATURE OF PERSONAL PROPERTY

The word **property** is used in law to denote both the right of ownership and the things which are the objects of the right of ownership.

Property in the second sense is either *real* or *personal;* personal property is again subdivided into chattels real and chattels personal. Real property and chattels real are interests in lands; chattels personal consists of personal property other than interests in land and may be either choses in possession or choses in action.

The right of ownership which a person has in land or chattels may be either legal or equitable.

Property in Land and in Chattels.—After the Norman Conquest land became subject to the law of feudal tenure; the absolute ownership vested in the King, of whom however it might be *held* by a subject for a hereditary estate of freehold which, in early law, could not be alienated, and descended to the heir of the tenant. Movable things, known as chattels or goods, were not the subject of tenure, their alienation was not restricted, and they passed to the executor or administrator of their owner.

A freeholder, if dispossessed, could obtain *restitution* by a real action, but an owner of chattels had merely a personal action for the recovery of *damages. Freehold* estates were hence known as realty, but leasehold interests, not being recoverable by a real

action, were classed with chattels and termed chattels real to distinguish them from movable goods or chattels personal.

In later times the terms real estate was applied to the realty, which passed to their heir; personal estate, on the other hand, included all chattels which went to the executor, whether chattels real or personal.

Remedies for the Recovery of Goods.—The most ancient remedy for an owner or possessor of goods who had lost possession unwillingly was an action of theft, which lay against any person in whose possession the goods were found and in which the owner might obtain restitution of the goods and, in case of theft, punishment of the thief.

The owner might also sue civilly without alleging theft, but in that case the defendant could absolve himself by paying the *value* of the goods. On its civil side this action was superseded in the thirteenth century by the action of trespass, and it remained only as an appeal of larceny, *i.e.*, a criminal proceeding at suit of the party injured against one guilty of theft.

Restitution of the stolen goods could also be obtained in an appeal of larceny. But by a strained construction of the laws of forfeiture it was held that, on the conviction of a thief in an appeal, not only his own chattels but also the stolen goods were forfeited to the Crown. And in case of a conviction upon indictment, *i.e.* at suit of the Crown, the stolen goods were also forfeited and the owner could not obtain restitution unless he sued an appeal. Thus the restitution changed its nature and was considered a waiver of the King's right to forfeiture rather than an enforcement of the owner's title.

Appeals of larceny were abolished in 1819.

Bailment. When an owner *voluntarily* parts with the *possession* of goods for a temporary purpose, as upon a loan or pledge, the transaction is termed a bailment. In such cases the possessor or bailee had the foregoing remedies for recovery of possession and was absolutely responsible for the safe return of the goods to the owner or bailor, who could sue only the bailee and not any third person in possession of the goods. Later it was held that either the bailor or bailee might sue any one who took the goods out of the possession of the bailee.

Civil Remedies for the Recovery of Goods. In place of the old proceedings for restitution the following remedies were developed.

1. The action of *trespass de bonis asportatis* for the direct violation of the possession of goods. This lay only against the actual taker and was an action merely for *damages* and not for recovery of the goods, the property in which passed to the trespasser.

2. The action of *replevin*, which originally lay to recover damages for unlawful distress. Goods taken in distress were considered to be in the custody of the law, and the plaintiff might, on giving securing to prosecute his claim for damages, obtain their re-delivery. At first however this was technically impossible if the defendant even *claimed* the goods as his own, but later it was held that if the property were in fact the plaintiff's at the time of the taking, the sheriff might proceed to replevy the goods. Hence in any unlawful taking the plaintiff might, instead of bringing trespass whereby he lost the property in the goods, bring replevin, whereby he recovered it. Replevin, like trespass, lay only against the actual taker. See *The Replevin Act*, R.S.O. (1914) c. 69.

3. The right to peaceably retake the goods wherever found, unless they had been sold in market overt to a person buying in good faith.

4. The action of *detinue*. This was originally an action for breach of contract to deliver a specific chattel, but was extended to the case of detention of goods by a finder, and later might be brought against any one who detained goods however he had obtained possession of them. Judgment was for the return of the goods *or* their value.

5. The action of *trover*. This was originally an action for damages against a finder of goods who had *converted* them, but later might be brought against any one who had by any means come into possession of goods and refused to restore them, the refusal amounting to a conversion, which was the gist of the action.

Trover and detinue were therefore remedies for the violation of the *right to possess*.

In no personal action however, except replevin, was there any process for obtaining specific restitution of the goods.

Trespass and trover were for damages only, and even in detinue the plaintiff might only recover the value of the goods if the defendant refused to restore them. Since 1854 however the Court may order execution to issue for the delivery of the goods without giving the defendant the option of paying their value.

Replevin is also an action for damages, though re-delivery of the goods forms part of its process.

Under the present practice every action is commenced by a *writ of summons* endorsed with a simple statement of the nature of the claim, and the old forms of action are abolished.

Recovery of Chattels Bailed. A bailee is entitled to use all remedies protecting possession or the right to possess. *The Winkfield* [1902] p. 42. The bailor, in modern law, can sue only when he can resume possession of the goods at will; when he has contracted to give the bailee exclusive possession his right to recover from strangers is suspended during the bailment, but revives at its termination. But in certain cases under the Factors Act, R.S.O. (1914) c. 137, s. 3, the bailor may altogether lose his right in consequence of a disposition of the goods made by the bailee *without* his consent.

Complete loss of ownership of goods may also occur without the owner's consent (*a*) by sale in market overt; (*b*) by the law of a foreign country; (*c*) by estoppel; (*d*) by abandonment; (*e*) by their nature being entirely changed; (*f*) in case of money or negotiable securities by transfer to a holder in due course.

right of action for the recovery of goods may also be lost under the Statute of Limitations, R.S.O. (1914) c. 75.

Equitable interests may exist in chattels and are generally of the same nature as equitable estates in land.

Thus if chattels personal are assigned to A on trust for B, A has the legal ownership, but B, the *cestui que trust*, has the equitable interest, which he can enforce against every one except a *bona fide* purchaser for value from A without notice of the trust.

Trusts of chattels were not affected by the Statute of Uses, nor is their creation required to be proved by writing under the Statute of Frauds.

Personal property may also be divided into:

(*a*) **Choses in possession**, *i.e.* movable tangible goods the subject of physical possession.

(*b*) **Choses in action**, *i.e.* mere rights enforceable by action, as the right to recover money due or rights under a contract. A mere right of action was at Common Law incapable of transfer as being the right to the performance of a duty owed by a particular person to a particular person. Hence a debt could not be directly assigned. Indirectly however, an assignment could be effected by novation, *i.e.* if A owed money to B a new agreement might be made by consent of A, B and C by which A should pay the money to C. Moreover A might give his consent in advance by undertaking to pay either to B or to his *assigns*. This led to the introduction of Bills of Exchange, *i.e.* written orders from A to B—his debtor—to pay a sum of money on a certain day to a named person or to the bearer of the order. Such an order *when accepted* bound B—the acceptor—to pay to any *bona fide* holder of the bill, and thus the right to sue became transferable by the mere delivery of the bill. Later a bill of exchange payable to a named person or his *order* also became transferable by *indorsement* of the payee's name and delivery of the bill.

A chose in action might also be assigned by A—the person entitled to the right—giving to a third person a letter of attorney, empowering him to sue on the claim in A's name.

A chose in action might be either *legal*, *i.e.* recoverable by action at law, or *equitable*, *i.e.* recoverable only suit in Chancery, *e.g.* a legacy. In equity *all* choses in action were assignable, but if they were legal the assignee could sue only in the name of the assignor; if equitable he could sue in his own name.

An assignee of a chose in action must give notice to the person bound and the assignment was—except in the case of negotiable instruments—subject to equities. Thus if A owed money to B and B assigned to C, A might when sued by C avail himself of any defence or set-off which he would have had against B.

By the Judicature Act, R.S.O. (1914) c. 56, an assignment of any *debt* or *legal* chose in action may be made so as to pass the *legal* right, and all remedies provided that it is (1) *absolute* and not by way of charge; *Hughes* v. *Pump House Hotel* [1902] 2 K.B. 190; *Durham* v. *Robertson* [1898] 1 Q.B. 765; (2) *in*

writing under the hand of the assignor; (3) that *notice in writing* has been given to the debtor or person liable. But the assignment is, as before, *subject to equities.*

Modern personal estate also includes (*a*) mortgages— the charge created by a mortgage being personal estate in equity; (*b*) negotiable securities, which are tangible *evidence* of a chose in action; (*c*) Government annuities or stock and shares or debentures of joint stock companies, which are choses in action, *Colonial Bank* v. *Whinney*, 30 Ch.D. 261; 11 A.C. 426; (*d*) copyrights and patents, which are *monopolies*, but differ from other obligations in that they are available against the whole world and have always been directly assignable.

CHAPTER 2

CHOSES IN POSSESSION

CHOSES in possession are tangible movable things the ownership of which differs from that of land in that (1) it is *absolute* and not derived out of any other superior ownership; (2) it is *indivisible, i.e.* it cannot be divided into smaller successive interests, whereas an estate in fee simple in land can be divided into smaller estates taking effect successively.

Note that *ownership, possession* and the right to *possess* are distinct from each other and may be separated. An owner need not have possession, and if out of possession may or may not have the right to possess. Possession may exist without ownership and is protected against all but the owner, *Armory* v. *Delamirie*, 1 Str. 505, and even against him if he has parted with his right to possession.

Ownership may be acquired (1) through a previous title, *e.g.* (*a*) by succeeding to the title of a previous *owner* as on sale; (*b*) by succeeding to a previous *possessor* under circumstances which deprive the previous *owner* of his title as by purchase in market overt; (*c*) by accession; (*d*) by confusion of substances. (2) Irrespective of any previous title, *e.g.* (*a*) under excise of sovereign authority; (*b*) by occupancy—*i.e.* original taking possession—of ownerless things. Occupancy of things which are not ownerless, *e.g.* lost goods, makes the occupant merely *possessor* and not owner.

Possession is a question of fact and is acquired when sole physical control has been effectively gained with intent to exclude the world at large. When acquired it is not lost so long as the power of *resuming* physical control remains.

Ownership without possession may exist (*a*) where the owner has lost possession involuntarily, as where he loses goods or they are taken from him. In such cases he may sue either for the return of the goods or their value, or else for damages for their wrongful conversion. To succeed he must show the same cause of action as would have enabled him to maintain *trover, i.e.* a

right to immediate possession and a wrongful conversion: proof of ownership alone without the right to possess is insufficient, but a mere finder or taker, having the right to possession as against all except the owner, can maintain trover.

If goods are feloniously obtained from the owner he cannot bring any civil action against the thief until he has been prosecuted criminally, *Appleby* v. *Franklin*, 17 Q.B.D. 95. He may retake the goods, but it is a misdemeanour to receive them back on an agreement not to prosecute.

(*b*) In case of bailment, *i.e.* delivery of goods on a condition that they shall be restored by the bailee to the bailor or according to his directions as soon as the purpose for which they were bailed shall be answered, *R.* v. *Macdonald*, 15 Q.B.D. 323. In all cases of bailment the *property* remains in the bailor and only *possession* passes to the bailee. If it be a *simple bailment*, *i.e.* one which does not give the bailee a right to exclude the bailor, as where goods are lent or are in the hands of a warehouseman or carrier, *either* bailor *or* bailee may maintain trover. But if the bailee has such a right, as where goods are pawned or let for hire, then he only can maintain trover. If however any bailee converts the goods to his own use, *e.g.* if a hirer wrongfully sells them, the bailment is determined and the right to possession vests in the bailor, who may maintain trover against the bailee or any third person.

At common law the bailee alone had the right of action and was therefore responsible for the safe return of the goods, though taken from him or lost by him without his fault, unless he was deprived of them by the act of God or the King's enemies, but for damage or destruction of the goods while in his possession he was not liable without negligence.

By modern law a bailee, in the absence of *negligence*, is not as a rule liable for the failure to return goods taken from or lost by him, *The Winkfield* [1902] P. 42. Innkeepers and carriers are by common law absolutely responsible for loss unless caused by the act of God or the King's enemies, though their liability has been limited by the Innkeepers Act, R.S.O. (1914) c. 173, the Dominion Railway Act of 1919, and the Canal and Shipping Act, R.S.C. (1906) c. 113. The responsibility of a bailee for damage to goods while in his possession is generally governed by the same principles.

If goods in possession of a bailee are destroyed or injured by a stranger the bailee—whether responsible to the bailor or not—can sue the stranger. See *Coggs* v. *Bernard*, 1 Smith, L.C. If the bailment were determinable at will either bailor or bailee may sue; if it were such as to give the bailee a right to exclude the bailor the bailee may sue, but the bailor may also sue for any permanent damage done to his property in the goods.

Lien is the right of a person in possession of goods to retain them until a debt due to him is paid. It may be (*a*) *particular*, *i.e.* a right to retain the goods out of which the debt arose; (*b*) *general*, *i.e.* a right to retain in respect of a general balance of account. A particular lien is given by common law over goods which a person is compelled to receive, as in case of carriers and innkeepers, also to any person who has by labour or skill improved an article entrusted to him.

A general lien arises by (1) express contract; (2) contract implied by the course of dealing between the parties; (3) the custom of some trade, business, place or market.

Solicitors have a lien on all documents of their clients for their *professional* charges, but on title-deeds the lien can only be co-extensive with the client's interest, thus if the client be a life tenant or mortgagee the solicitor cannot retain the deeds against the remainderman or mortgagor.

A lien is merely a right to retain possession, which is sufficient to support an action of trover, but except in the case of innkeepers gives no authority to sell the goods or charge for their keep. It is lost if possession is given up or security is taken for the debt under circumstances showing an intention to abandon the lien.

On a distress for rent the *property* in the goods seized remains in the owner until they are sold.

In all these cases therefore of taking or finding goods, bailment, lien and distress the property in goods is in one person, though the right to possess may be in another and possibly possession in a third.

CHAPTER 3

ALIENATION OF CHOSES IN POSSESSION

At common law the transfer of chattels might be effected with or without writing, but was invalid without delivery of possession. At present they may be transferred (1) by delivery of possession with intent to pass the ownership; (2) by deed; (3) by a *contract* of sale.

Possession may be delivered (1) by actual physical transfer of the goods or the means of access to the goods, *e.g.* the key of the place where they are stored; (2) constructively, as where a seller changes the nature of his possession by agreeing to hold goods as bailee for the buyer, *Elmore* v. *Stone*, 1 Taunt. 458. It is doubtful if a gift can be effected by constructive delivery in this way.

A gift of personal chattels may be effected (1) by actual delivery of possession, *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Cochrane* v. *Moore*, 25 Q.B.D. 75, in which case no deed or writing is necessary nor need there be any consideration; (2) by *deed* when actual delivery is not necessary.

If goods are already in the possession of the intended donee a constructive delivery takes place when he ceases to hold as bailee and with the donor's consent begins to hold on his own account, *Kilpin* v. *Ratley* [1892] 1 Q.B. 582.

If the goods are in the custody of a *simple* bailee, they are in construction of law deemed to be in possession of the bailor, and his constructive possession may be transferred by the agreement of all parties that the bailee shall hold the goods for the transferee.

Where goods are at sea indorsement and delivery of the bill of lading is equivalent to delivery of the goods.

On a loan for consumption the *ownership* of the chattel passes on delivery of possession and the lender has merely the right to enforce restoration of the same quantity.

A grant of chattels by deed is irrevocable though made without consideration. By the Bills of Sale and Chattel Mortgage Act,

R.S.O. (1914) c. 135, s. 8, any *absolute* assignment of chattels in writing, not followed by an immediate delivery of possession must be attested and registered in accordance with the Act, otherwise—unless it is an assignment for creditors [s. 21 (9)]—it will be void against the assignor's *creditors* with regard to such of the chattels as remain in the assignor's apparent possession and may be defeated by a subsequent assignment duly registered. Assignments by deed by way of security for the payment of money are *altogether* void unless made and registered in accordance with the Act.

Sale.—When a contract has been made for the sale of lands the legal estate remains in the vendor until transferred to the purchaser by a deed of conveyance. But in case of a contract for the sale of chattels personal the property may pass *by the contract* without further formality either at once or upon fulfilment of some condition. A *contract of sale* of goods may be (1) a sale—where the property is transferred at once, or (2) an agreement to sell—where the transfer of the property is to take place at a future time or on the fulfilment of some condition. When the time elapses or the conditions are fulfilled it becomes a sale.

If the goods are unascertained no property is transferred until they are ascertained.

If they are ascertained the property is transferred when the parties so intend. Unless a different intention appears the property passes.

(*a*) If there is an *unconditional* contract for the sale of *specific* goods *in a deliverable* state—when the contract is made, *Tarling* v. *Baxter*, 6 B. & C. 300.

(*b*) If there is a contract for the sale of *specific* goods and the buyer is bound to do something to the goods *for the purpose of putting them into a deliverable* state—when it is done and the buyer has notice thereof, *Acraman* v. *Morrice*, 8 C.B. 449.

(*c*) If there is a contract for the sale of *specific* goods *in a deliverable* state and the buyer is bound to weigh, measure, test, &c., the goods *for the purpose of ascertaining the* price —when it is done and the buyer has notice thereof, *Zagury* v. *Furnell*, 2 Camp. 239.

(*d*) If goods are delivered on approval when *either* the buyer signifies approval or adopts the transaction, *or* when without giving notice of rejection he keeps the goods beyond the time fixed for their return or a reasonable time.

(*e*) If there is a contract for the sale of *unascertained or future goods* by description—when goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, *Rohde* v. *Thwaites*, 6 B. & C. 388; *Langton* v. *Higgins*, 28 L.J. Ex. 252.

If the seller in pursuance of the contract delivers the goods to the buyer or to a carrier or other bailee for transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract.

Right of Disposal.—On a contract for the sale of specific goods *or* where goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of disposal until certain conditions are fulfilled. In such case in spite of delivery to the buyers or his bailee the property does not pass until the conditions are fulfilled. If goods are shipped and by the bill of lading are deliverable to the order of the seller or his agent the seller is *prima facie* deemed to reserve the right of disposal.

Formation of the Contract.—Contracts for the sale of goods under the value of $40 are governed by the common law rules and require no special form. If they are over the *value* of $40 then by s. 12 of the Statute of Frauds R.S.O. (1914) c. 102, the contract is *not enforceable* unless (1) the buyer accepts part of the goods and actually receives them; *or* (2) gives something in earnest; *or* (3) part payment; *or* (4) some note or memorandum in writing is made and signed by the party to be charged or by his agent.

Acceptance here does not mean acceptance of the *goods* in performance of the contract, but takes place whenever the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, *Abbott* v. *Wolsey* [1895] 2 Q.B. 97.

Receipt may be by actual or constructive delivery.

The note or memorandum in writing must contain (*a*) all the terms of the contract, including the price, if fixed: if not fixed the law implies a promise to pay a reasonable price; (*b*) the names of the parties. It must be *signed* by the party to be charged or his agent. When a contract is valid solely by a memorandum in writing it comes within the Bills of Sale and Chattel Mortgage Act, R.S.O. (1914) c. 135, except in the case of a transfer of goods in the ordinary course of business of any trade.

Possession of Goods Sold—Although the property may have passed the vendor is not bound to deliver the goods sold until the purchaser is ready to pay the price, unless otherwise agreed. And if the price is not duly paid or tendered then if the goods were sold without any stipulation as to credit, *or* the credit has expired, *or* the buyer becomes insolvent, the seller in possession of the goods has a lien upon them for their price. If the property has *not* passed the vendor has a similar right of withholding delivery. The vendor may exercise his lien though he is in possession of the goods as bailee for the buyer. He will lose it not only by loss of possession—actual or constructive—of the goods, but also if he delivers to the buyer any document of title to the goods which gets into the hands of a holder for value in good faith.

A buyer who with the vendor's consent gets *possession* of goods or documents of title to goods may also, though the property has not passed to him, deprive the seller of his *property* by transferring them to a third person who takes in good faith. And in the same way, though the property has passed to the buyer, he may be deprived of it by a transfer of the goods or documents of title by the seller who has been allowed to remain in possession of them, *Lee* v. *Butler* [1893] 2 Q.B. 318; *Helby* v. *Matthews* [1895] A.C. 471.

Where an unpaid vendor has parted with the possession of goods and the purchaser becomes insolvent the vendor has the right of *stoppage in transit, i.e.* of recovering the goods while in course of transit to the purchaser. But this right also may be defeated if the bill of lading or any document of title has been transferred to the buyer and re-transferred by the buyer to a person who takes in good faith and for valuable consideration, *Sewell* v. *Burdick*, 10 A.C. 74; *re Westzinthus*, 5 B. & Ad. 817; *Kemp* v. *Falk*, 7 A.C. 585.

Delivery to a carrier is *prima facie* delivery to a buyer and deprives the vendor of his lien unless he reserves the right of disposal; the vendor's right of stoppage in transit then begins; when it is exercised he resumes possession and his lien begins again.

An unpaid seller has also a right of resale when the goods are perishable or when he has given notice to the buyer who does not within a reasonable time pay or tender the price.

Mortgages of Goods.—There is a pledge of goods when *possession* of them is transferred to a creditor as security for a loan. There is a mortgage when the *property* in them is transferred subject to the right of the borrower to retain possession until default in payment and to redeem the goods by payment of the debt.

At common law a mortgage may be made without deed, but now all *written instruments* creating mortgages of goods must be executed in accordance with the Bills of Sale and Chattel Mortgage Act, R.S.O. (1914) c. 135.

By that Act all bills of sale of personal chattels given *as a security for the payment of money* are void unless made and registered in accordance with the required forms. But the Act does not apply to documents accompanying transactions in which the possession is passed, as in the case of a pledge, *Ex parte Hubbard*, 17 Q.B.D. 690; *Charlesworth* v. *Mills* [1892] A.C. 231.

A transfer in equity of property in chattels may take place either (1) by the creation of a trust by A, the legal and beneficial owner, in favour of B; (2) by A, the owner of an equitable interest, assigning his interest to B. A trust of chattels may be created by word of mouth, and is valid without any transfer of possession or valuable consideration. But an incomplete transfer intended as a gift will not be enforced in equity as a trust, *Richards* v. *Delbridge*, L.R. 18 Eq. 1. By the Statute of Frauds, R.S.O. (1914) c. 102, all *assignments* of any trust must be in writing signed by the assignor or by will. All written declarations of trust of chattels made without transfer and all written agreements by which a right in equity to any personal chattels is conferred are within the Bills of Sale and Chattel Mortgage Act, unless for the benefit of creditors generally or as a marriage settlement.

Future Goods.—A man cannot assign chattels which he merely expects or hopes to acquire in the future, but he may *contract* to assign after-acquired goods, and any agreements purporting to be an assignment of future goods can only operate as a contract to assign them when acquired; no *legal* ownership will pass until the assignment is actually made, but the *equitable* interest will pass to the assignee as soon as the goods are acquired by the assignor, *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Joseph* v. *Lyons*, 15 Q.B.D. 280.

Under the Bills of Sale and Chattel Mortgage Act, R.S.O. (1919) c. 135, written assignments of future goods by way of security are with certain exceptions void except against the grantor.

Personal Incapacity.—An alien was formerly subject to disabilities, but under the Naturalisation Act, R.S.C. (1906) c. 77, is on the same footing as a natural born British subject save in respect of owning a ship.

At common law the gift or conveyance of an infant is in general *voidable*. Under the Infants' Act, R.S.O. (1914), c. 153, s. 5, an infant may convey or mortgage or to secure money lent to him by order of the Supreme Court.

Gifts or assignments by lunatics or idiots are *void* if voluntary, but if for valuable consideration are *voidable* only if the other party knew of his condition. A convict or person against whom sentence of death has been pronounced or recorded cannot contract, or alienate, or charge his property. During his disability an administration of his property may be appointed.

Alienation for Debt. As a rule the contracting of a debt merely gives the creditor the right to sue the debtor personally. Before judgment the claim cannot be satisfied out of the debtor's property.

But in some cases chattels may be seized and sold without a judgment:

(1) Where they are distrained and sold by a landlord to satisfy his claim for rent.

(2) Where they are seized and sold to satisfy Crown debts.

(3) Where they are distrained and sold to satisfy taxes or rates.

Except in the above cases chattels can be seized in the owner's lifetime only in execution of a judgment or upon his bankruptcy. If judgment is obtained in the Supreme Court for a sum of money the debtor's goods may be seized under a writ of *fieri facias* which directs the sheriff to cause the amount of the debt to be realized by a sale of the debtor's goods and chattels. By the Execution Act, R.S.O. (1914) c. 80, (s. 26), a writ of *fi. fa.* binds the property in the goods only from the time it is delivered to the sheriff, and even after it is delivered a purchaser in good faith and for valuable consideration without knowledge of its delivery acquires a good title.

Chattels may also be seized and sold in execution of judgments of inferior courts, *e.g.* County Courts.

The seizure of goods in execution is, if the goods are sold or retained by the sheriff for 14 days, an *act of bankruptcy* under the Bankruptcy Act of 1919, s. 31 (e). But the execution is not thereby avoided and a purchaser has a good title against the trustee in bankruptcy. Wearing apparel, bedding, and tools and implements of trade, etc., are exempt from seizure under the Execution Act, R.S.O. (1914) c. 80, s. 3.

Where the debtor has merely an equitable interest in goods s. 19 of the Execution Act then applies.

Choses in possession may also be alienated in their owner's lifetime on his bankruptcy.

Death.—On the death of a person his chattels have always been liable for his debts. A creditor may (1) sue the executor or administrator and obtain execution out of the goods of the deceased; (2) apply in equity for the administration of his estate; (3) take proceedings to have the estate administered in bankruptcy.

If a deceased debtor's goods are distributed by his personal representative without payment of debts the creditors may follow the goods in the hands of all persons who have not acquired for valuable consideration and without notice.

Fraudulent Alienations.—(1) By 13 Eliz. c. 5, R.S.O. (1914) c. 105, alienations of lands, goods or chattels made *for the purpose* of defrauding creditors are void unless made upon valuable consideration to a person who has no notice of the fraud. Whether or not there is such a purpose is determined by the

circumstances of each case, *Ex parte Russell*, 19 Ch.D. 588. (2) Under the Bankruptcy Act of 1919, ss. 3, 4, (*a*) a conveyance made by an insolvent person with the object of giving a fraudulent preference to one of his creditors is void if bankruptcy follows as a result of a petition presented within six months after the conveyance; (*b*) fraudulent conveyances are void against the trustee in bankruptcy; (*c*) voluntary settlement may be avoided by a subsequent bankruptcy.

CHAPTER 4.

SHIPS

SHIPS are governed by special rules, now for the most part consolidated in the Canada Shipping Act, R.S.C. (1906) c. 133, of which the following are the chief provisions:

A British ship is one owned wholly by (1) natural born British subjects; (2) naturalised persons and denizens who have taken the oath of allegiance and reside or carry on business in British dominions; (3) British corporations having their principal place of business in British dominons, s. 952.

No alien can be the owner of a British ship. Nor can a natural born subject who has become a subject of a foreign State unless he subsequently takes an oath of allegiance and resides or carries on business in British dominions.

The property in a British ship is divided into sixty-four shares and not more than sixty-four persons can be registered at one time as owners, but any number not exceeding five may be registered as joint owners of a share.

No notice of any trust can be entered on the register, and the registered owner or mortgagee of a ship or share alone has power to dispose of it. But equitable interests may be enforced against an owner or mortgagee.

Every British ship—except certain small vessels—must be registered, (s. 6) whereupon a certificate of registry is given on which any change occurring in the registered ownership must be indorsed.

A registered ship or share must be transferred by bill of sale in the prescribed form executed before and attested by a witness or witnesses, ss. 48, 49. The transferee cannot be registered until he has made a declaration that he is qualified to own a British ship.

All mortgages must be in prescribed form, must be recorded by the registrar in the order of time in which they are produced to him, and have priority according to the date of registration. s. 47.

Transfers and discharges of mortgages must be duly registered.

For the purpose of sale or mortgage out of the country in which the port of registry is situated the registrar may grant certificates of sale or mortgage.

The transmission of the property or of the interest of a mortgage in a ship or share by any means other than a transfer under the Act, *e.g.* on death, must be authenticated and registered in accordance with the Act.

Ships are subject to maritime law, according to which certain claims attach upon the ship itself and may be enforced by an action *in rem*, *i.e.* an action in the Admiralty Court under which the ship may be arrested and sold to satisfy the claim. This may occur:

(1) Where a maritime lien exists, *i.e.* where the claim is for (*a*) damages caused by collision due to faulty navigation; (*b*) salvage services; (*c*) wages and disbursement of the master and seamen's wages; (*d*) money lent and secured by a bottomry bond, *i.e.* a contract whereby the ship is pledged for the payment, *in the event of the voyage ending successfully*, of money advanced for *necessaries* for the ship and voyage.

A maritime lien does not depend upon possession, but attaches on the ship in the hands of any person, even a *bona fide* purchaser without notice.

(2) In case of claims for towage and necessaries supplied to a foreign ship or to a ship whose owner is not domiciled in England or Wales elsewhere than in the port to which she belongs. Here there is no maritime lien, and the ship can only be arrested while she is owned by the debtor.

(3) Claims to the ownership of or title to a ship.

The Court may also decide all questions between co-owners as to the ownership, possession or employment of a ship and settle accounts and direct the ship to be sold or make any order it may think fit.

The Admiralty jurisdiction is now vested in Canada in the Exchequer Court of Canada, and administered by Local Judges in Admiralty. See R.S.C. (1927), 141.

A charter-party is an instrument by which a vessel or part of it is hired by one person for a given voyage or period. It may be either (*a*) a lease of the ship giving the charterer possession or (*b*) (more usually) an agreement giving the charterer merely the right to the use of the ship and the services of the master and crew. Where a ship is open for the carriage of goods generally it is called a general ship and each contract for carriage is contained in a bill of lading, which is also an acknowledgment by the master of the receipt of the goods for a delivery to a named consignee or his assigns. It also constitutes a *document of title* to the goods, and hence the property in the goods *may* pass by indorsement and delivery of the bill of lading, *Sewell* v. *Burdick*, 10 A.C. 74. Every consignee named in a bill of lading and every indorsee to whom the property passes by consignment or indorsement may sue and be sued on the bill of lading.

Freight is the money payable for the hire of a ship or the carriage of goods in it.

The master may hypothecate both cargo and freight with the ship by a bottomry bond, but can only bind the cargo for its own benefit and as a rule must first communicate with the cargo-owner.

Respondentia is a contract similar to bottomry but entered into with respect to cargo only. The master has no authority to sell any part of the cargo except in case of necessity where he cannot communicate with its owner.

Where some portion of the ship or cargo has been sacrificed to secure the general safety of the whole, *e.g.* in the case of jettison (throwing overboard part of the cargo) the persons interested in the ship, cargo and freight must make a general average contribution to the loss. Where such a sacrifice is made to preserve some part only, *e.g.* the cargo, the loss is borne by that part and is termed particular average.

CHAPTER 5.

CHATTELS WHICH DESCEND TO THE HEIR

SOME chattels are so closely connected with land that, contrary to the general rule, they pass with the land whenever it is disposed of. The common law rule that real estate descended to the heir is now modified by the Devolution of Estates Act, R.S.O. (1914) c. 119, under which it devolves upon the personal representatives, who hold it, subject to payment of the debts of the deceased, in trust for his heir or devisee. The descent of such chattels is modified to correspond. The chattels which pass with the land are:

(1) **Title-deeds**, which pass on a conveyance or devise of land without being expressly mentioned. Where however a vendor retains any part of an estate to which any documents of title relate he has a right to retain such documents. The tenant of an estate in fee simple has an absolute property in the deeds but where lands are held for a limited estate, *e.g.* for life, the tenant has merely an interest in the deeds co-extensive with his estate and a right to their possession during its continuance. A tenant for a term of years has the property in the deeds relating to the term, but no rights to the deeds relating to the freehold.

(2) **Heirlooms** are personal chattels which by a special custom go to the heir and not the personal representative of the owner. The owner can dispose of them during life but not by will if he leaves the land to descend to the heir.

Fixtures are such chattels personal as are fixed to the soil or a building. Everything attached to the land was considered as part of the land, and houses themselves were and still are regarded as land so as to pass by conveyance of the land without special mention. And a conveyance of a building includes all ordinary fixtures and even trade fixtures unless a contrary intent appears. And where fixtures are attached with the concurrence of the mortgagor to mortgaged land or building they become

subject to the mortgagee's security. *Hobson* v. *Gorringe* [1897], 1 Ch. 182; *Reynolds* v. *Ashby* [1904], A.C. 466.

Chattels temporarily affixed for their more convenient use and not as an improvement to the inheritance are not fixtures. *Leigh* v. *Taylor* [1902], A.C. 157.

Tenants for years may now remove before the expiration of their tenancy fixtures set up for trade ornament or domestic use.

A tenant for years can during the term sell or mortgage removable fixtures with or without his interest in the land, and they can be seized under a writ of *fi. fa*, and will pass to his trustee in bankruptcy.

A written assignment of fixtures separately from the land is a bill of sale within the Bills of Sale and Chattel Mortgage Act, R.S.O. (1914), c. 135, but—except in the case of trade machinery—not when they are assigned together with any interest on the land.

Fixtures set up by a life tenant for trade ornament or domestic use pass to the personal representative, but if erected by a tenant in fee simple they pass to the devisee or heir. If fixtures are demised to a tenant with a house the property remains in the landlord subject to the tenant's right of possession during the term.

Chattels vegetable, *i.e.*, timber, corn, fruit, &c., pass with the land without express mention if unsevered, but may be excepted or sold apart from the land. If a tenant in fee simple dies without having sold or devised them, then (*a*) emblements, *i.e.*, annual industrial growths, pass to the personal representative, but (*b*) natural growths to the heir. Emblements belong also to the personal representative of a life tenant and to a tenant at will if dismissed from his tenancy before harvest. Tenants at a rack-rent holding under a landlord who has a limited interest which expires during their tenancy continue to hold until the end of the current year of their tenancy.

Where land is let to a tenant for years or life the property in the timber, if no exception is made, belongs to the owner of the inheritance subject to the tenant's right to fruit loppings for fuel, &c., but if cut or blown down it immediately belongs to the owner of the inheritance. If however a tenant *without impeachment of waste* cuts down timber in a husbandlike man-

ner it belongs to him when severed. As to what is timber, see *Dashwood* v. *Magniac*, [1891], 3 Ch. 306.

Animals *feræ naturæ* are not the subject of property until killed, caught or tamed, and will not pass to the personal representative. *Blades* v. *Higgs*, 11 H.L.C. 621.

The occupier of the land has the sole right of killing and taking the game unless expressly reserved to the landlord or some other person.

If the landlord has reserved the right of killing game he may authorizes any person who has a game license to enter on the land for the same purpose.

CHAPTER 6.

ACTIONS EX DELICTO

PERSONAL actions were brought to enforce an obligation imposed on the defendant personally to make satisfaction for a wrong or breach of contract. The common law satisfaction was damages: hence the right to bring a personal action is a thing valuable in money and in this sense is property. But it differs from ownership in that it is a right against a particular person and not against all the world.

From the thirteenth century a personal action *sounding in damages* became the regular remedy for a trespass or violation of rights. Formerly actions for damages could be brought only in the common law courts but by the Judicature Act, R.S.O. (1914), c. 56, the Courts of Chancery and Courts of Common Law are fused into one Supreme Court of Ontario now divided into the Appellate Division, and the High Court Division. Each division of the Supreme Court may give legal or equitable remedies but the nature of legal and equitable rights and remedies remains unchanged.

Personal actions are (1) *ex delicto* based on torts, *i.e.* wrongs independent of contract; (2) *ex contractu* based on breach of contract.

Torts. The right of action for a tort is to a limited extent property. The right to sue and liability to be sued are not always transmissible. At common law if either party died the right of action ceased. But R.S.O. (1914), c. 121, s. 41, provides that except in cases of libel and slander, the executor or administrator may maintain an action for all torts or injuries to the person or to property in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased, but the action must be brought within one year from the death.

By the *Fatal Accidents Act*, R.S.O. (1914), c. 151, s. 3, where the death of a person is caused under such circumstances that

the deceased could have maintained an action, the wrongdoer is liable to an action for the benefit of his family; but by s. 6 not more than one action shall and that must be brought within twelve months after the death.

The death of the wrongdoer also formerly put an end to an action *ex delicto*. But R.S.O. (1914), c. 121, s. 41 (2), provides that, except in the cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong, but the action must be brought within one year from the death.

On bankruptcy all rights of action for injury to property pass to the trustee, but rights of action for injury to the person or reputation remain exercisable by the bankrupt.

A bare right of action for a tort cannot (probably) be assigned. In the case, however, of a contract of insurance the insurer who has paid is *subrogated* to all the rights of the insured, *e.g.*, if A has insured a ship belonging to C which is run down by the fault of B's ship, A having paid C has all C's remedies against B or the ship.

When a person has obtained judgment in tort for damages against another person he has no longer a bare right of action but a judgment debt enforceable by his own and against the debtor's personal representative and assignable.

CHAPTER 7

CONTRACT

Rights and obligations may also arise out of **contract**, *i.e.* an agreement or promise enforceable at law.

An agreement in this sense is the *expression* by two or more parties of their consent that something shall be done by some or one of them for the use of the other or others.

The expression of consent may be either by the concurrence of the parties in a spoken or written form of words or by the *acceptance* by one of an *offer* made by the other.

An offer of acceptance may be by words or conduct, but has no effect until *communicated* to the other party. *Taylor* v. *Laird*, 25 L.J. Exch. 329. In case of a contract by correspondence through the post an *acceptance* is complete when posted, even though it never arrives, *McGann* v. *Auger*, 31 S.C.R. 186.

An offer is revocable until *acceptance* is communicated, but a revocation has no effect until communicated, *Henthorn* v. *Fraser*, [1892], 2 Ch. 27; an acceptance when communicated is irrevocable.

To make an agreement the *acceptance must be absolute* and *identical with the terms of the offer.*

To be in all respects *enforceable at law*:

(1) The parties must have capacity to contract.

(2) The contract must in some cases be made or evidenced in a particular form or manner.

(3) There must, unless the contract is by deed, be valuable consideration for the promise.

(4) The consent of the parties must not be impeachable on the ground of mistake, misrepresentation, fraud, duress, or under influence.

(5) The object of the contract must be lawful.

If one of these requirements fails the agreement will be either void or voidable or unenforceable by action.

Capacity. (1) The contracts of an infant are valid if for his benefit or necessaries, *Nash* v. *Inman* [1908], 2 K.B. 1; but void

in all other cases under the Statute of Frauds, R.S.O. (1914), c. 102, s. 7, unless confirmed in writing after attaining majority.

(2) Contracts made by a married woman in Ontario are on the same footing as if she were a *feme sole* and can be enforced against her separate property but not otherwise. R.S.O. (1914) c. 149, s. 4.

(3) Contracts of an *insane* or *drunken* person are *voidable* if the other party knew of his condition, *Imperial Loan Co.* v. *Stone* [1892], 1 Q.B. 599.

Form. Contracts are (1) *special, i.e.* by deed or writing under seal; (2) *simple* —verbally or by writing not under seal.

A contract or promise under seal is conclusive evidence of consent except in certain cases of mistake, it is irrevocable before communication, *Xenos* v. *Wickham*, L.R. 2 H.L. 296, and is enforceable though given for no consideration.

But with certain exceptions a simple contract is not enforceable unless there is valuable consideration for the promise, *i.e.* unless the promisor gets or is to get something from the promisee *in return for his promise*, either some profit or benefit to himself or some forbearance, loss, or responsibility to the promisee as, *e.g.* the forbearance of the promisee to enforce some right. Law does not however inquire into the adequacy of the consideration provided that it is of some value to the parties.

A consideration may be executed, as an immediate payment, or executory, as a promise to pay.

But past consideration, *i.e.* a benefit already received will not support a *subsequent* promise to pay for it.

The right of action on a statute-barred debt may, however, be revived by a subsequent promise to pay without fresh consideration.

Form and Evidence. A. By the *Statute of Frauds*, R.S.O. (1914) c. 102, s. 5, no action can be brought (1) upon any special promise by an executor or administrator to answer damages *out of his own estate;* (2) on a promise to answer for the debt or default of another person; (3) on an agreement made in consideration of marriage; (4) on any contract or sale of lands or any interest in land; (5) on any agreement not to be performed within one year from the making unless *either* the agree-

ment *or* some note or memorandum hereof is in writing signed by the party to be charged or his agent.

Case (2) only applies to a contract of *guarantee*, *i.e.* a promise to be liable if some other person who is primarily liable makes default, *not* to a contract of *indemnity*, *i.e.* a promise to be answerable in any case, *Mountstephen* v. *Lakeman*, L.R. 7 H.L. 17.

Case (3) refers only to a contract (*a*) which *in its terms* is incapable of performance within the year, *Souch* v. *Strawbridge*, 2 C.B. 88; (*b*) which is not to be performed by *either party* within the year, *Donellan* v. *Reid*, 3 B. & Ad. 899.

The whole of the agreement must be in the written contract or memorandum, except in case (2), in which by s. 6 the consideration need not appear in writing.

Th contract or memorandum must show who are the parties, but need be *signed* only by the party to be charged. The signature may be placed in any part of the document provided it governs the whole.

The contract or memorandum may be contained in several documents if the part which is signed refers to the other portions, *Long* v. *Miller*, 4 C.P.D. 450.

It is not necessary that the actual *contract* should be in writing, it is sufficient if a memorandum exists before the action is brought. An offer including all the terms is a sufficient memorandum although there was no acceptance in writing, *Reuss* v. *Picksley*, L.R. 1 Ex. 342.

B. By **Limitations Act** R.S.O. (1914) c. 75, s. 55. An acknowledgment of or a promise to pay a simple contract debt must be in writing signed by the party to be charged, in order to take the case out of the Statute of Limitations.

By s. 8 of the Statute of Frauds, R.S.O. (1914), c. 102, no action can be brought to charge any person on a representation as to the character or credit of another to the intent that such other person may obtain money or credit unless the representation is in writing signed by the person to be charged.

A contract may be **void**—

(*a*(Where there is such a fundamental *mistake* as to negative consent, *Stuart* v. *Kennedy*, 15 A.C. 108; *Smith* v. *Hughes*, L.R. 6 Q.B. 597.

(*b*) Where expressly made *void by statute* as gaming and wagering contracts.

(*c*) Where the *object* is *illegal* as being contrary to (1) Common law or statute; (2) morality; (3) public policy. Of the last class the chief instances are agreements:

(i) Impending the administration of justice, *e.g.* to stifle a criminal prosecution. (ii) Involving maintenance or champerity. (iii) In restraint of marriage, *Hermann* v. *Charlesworth* [1905], 2 K.B. 123, or of trade, *Maxim Nordenfelt Co.* v. *Nordenfelt*, [1894], A.C. 535. Agreements in restraint of trade are void unless they are (*a*) for valuable consideration, even though made by deed; (*b*) reasonable as between the parties; (*c*) not injurious to the public interests, *Hermann* v. *Charlesworth*, [1905], 2 K.B. 123.

A contract is void if its immediate object is unlawful or if, though the immediate object is innocent, the agreement is to the knowledge of both parties made for an unlawful purpose, *Pearce* v. *Brooks*, L.R., 1 Ex. 213. Money paid under an unlawful agreement cannot be recovered except (*a*) where the illegal purpose has not been carried out; *Hermann* v. *Charlesworth*, [1905], 2 K.B. 123; (*b*) where it was paid under duress or undue influences or under a contract void by a statute passed for the protection of a class of persons of which the plaintiff was one, *Bonnard* v. *Dott*, [1906], 1 Ch. 740; (*c*) where deposited with a stakeholder and claimed from him before he has paid it away in pursuance of the agreement, *Hermann* v. *Charlesworth*, [1905], 2 K.B. 123.

A contract is voidable if the consent of either party was induced by misrepresentation, fraud, duress or undue influence, *i.e.* such party may be subject to certain limitations set it aside though *until he does so it is valid*. See *Cundy* v. *Lindsay*, 3 A.C. 459.

Effect of Contracts. A contract gives rights to and imposes obligations upon only the parties or their principals or personal representatives. Where however a party becomes bankrupt the benefit of his contract passes to his trustee and the liabilities are provable in the bankruptcy proceedings. The term chose in action is applicable to rights under a contract, though there has been no breach of contract, and the rules already given apply to their assignment.

Bills of exchange and promissory notes are simple contracts in writing to pay money and were assignable, the first by the Law Merchant, the latter under a statute of Anne, by indorsement and transfer. They are now governed by the Bills of Exchange Act, R.S.C. (1906) c. 119.

A **bill of exchange** is an unconditional *order* in writing addressed by one person (drawer) to another (drawee) signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, who may be either the drawer himself or a third party, or to bearer (payee). s. 17.

Acceptance is the signification by the drawee of his assent to the order of the drawer (s. 35) and is constituted either by the mere signature of the drawee on the face of the bill or his signature with the word "accepted." The drawee then becomes the acceptor.

A **promissory note** is an unconditional *promise* in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer. (s. 176.)

A bill or note is *negotiated* when it is transferred so as to constitute the transferee the "holder" (s. 60). "Holder" means the payee or indorsee in possession or the bearer (s. 29). If payable to bearer it is negotiated by delivery; if payable to order by the indorsement of the holder completed by delivery. The indorsement must be written on the bill or note and signed by the indorser; it may be (*a*) in blank, *i.e.* a simple signature not specifying any indorsee; the bill then becomes payable to *bearer* or (*b*) special, *i.e.* specifying an indorsee; it must then be again indorsed by him before a further transfer.

A **cheque** is a bill of exchange drawn *on a banker* payable on demand. (s. 165.)

To protect bankers s. 50 provides for the recovery of the amount paid on a forged endorsement. Where a banker in good faith, and without negligence, receives payment *for a customer* of a cheque crossed generally or specially to himself and the cus-

tomer has no title or a defective title the banker shall not incur any liability to the true owner by reason only of having received such payment (s. 175).

Cheques may be crossed (1) *generally*—by drawing two parallel lines across them, with or without the words "and Co."; (2) *specially*—by inserting the name of a banker; (3) *not negotiable*—when it ceases to be a negotiable instrument though still transferable. (s. 168).

The effect of the crossing is that the banker on whom it is drawn, must not pay it otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed or his agent for collection being a banker.

Liabilities. The acceptor of a bill or maker of a note is the person primarily liable. If he makes default the drawer of a bill and indorsees of a bill or note are liable, provided that it is *presented for payment* and *notice of dishonour* is given. (s. 96).

Any drawer or indorser to whom notice is not given is discharged (s. 96).

To charge the drawer or indorser of a foreign bill it must also be *protested*. (s. 112).

Bills of exchange, notes and cheques are negotiable instruments, that is to say a holder in due course has a good title in spite of any defect in the title of the person from whom he took it.

A **holder in due course** is a holder who has taken a bill or note (1) complete and regular on the face of it (*e.g.* duly indorsed, if indorsement was necessary); (2) before it was overdue; (3) without notice of any previous dishonour; (4) in good faith; (5) for value; (6) without notice of any defect in the title of the person who negotiated it (s. 56).

Every holder is presumed to be a holder in due course, but if it is proved that the acceptance, issue or negotiation of the bill was affected with fraud, duress, or illegality, the holder must then show that value has in good faith been subsequently given (s. 58). Valuable consideration is presumed to have been given for a bill until the contrary appears; it may be constituted by any consideration sufficient to support a simple contract or by an antecedent debt or liability (s. 53).

Except in the case of bills and notes payable on demand three *days of grace* are allowed for payment.

Securities for money lost in gaming or betting on gaming are by the Gaming Act, R.S.O. (1914) c. 217, s. 2, given for an *illegal* consideration, they are void as between the immediate parties but valid in the hands of a holder in due course.

The **common law remedies for breach of contract** are:

(1) In case of debt an action to recover the amount.

(2) When the return of a specific thing is claimed an action of detinue.

(3) In all other cases an action for damages.

In some cases of executory contracts there is also the *equitable* remedy of specific performance.

Damages may be *liquidated, i.e.* agreed on beforehand between the parties and may then be recovered in full provided they really form an estimate of the probable damages and do not merely amount to a penalty. Whether a sum so fixed is a penalty or liquidated damages does not depend upon what it is called by the agreement but on the circumstances of the case. Generally speaking if A agrees to pay (1) a certain sum on failure to pay a *smaller* sum or (2) so excessive that it *cannot* represent the actual damage or (3) the same sum for a breach of any one out of several conditions of unequal value, the sum will be considered as a penalty and only the actual damages will be payable, *Wallis* v. *Smith*, 21 Ch.D. 243; *Kemble* v. *Farren*, 6 Bing. 141.

CHAPTER 8.

DEBTS

Debts.—A debt may be defined as an *ascertained* sum of money *due* from one person to another. As the sum must be *ascertained* it follows that damages are not a debt until they have been ascertained by a judgment. *Re Charles*, 14 East. 197; *Jones* v. *Thompson*, E. B. & E. 63. And as the sum must be *due* it follows that rent, or a gale of an annuity, is not a debt until it has become due. *Webb* v. *Stenton*, 11 Q.B.D. 526.

Debts of record are debts due by the evidence of a court of record. They include:

(*a*) **Judgment debts**, *i.e.* debts due by the *judgment* of a Court of record.

A judgment creditor might formerly have imprisoned his debtor by a writ of *capeas ad satisfaciendum*, but now no person can be arrested or imprisoned for making default in payment of money except in the case of absconding or fraudulent debtors. See R.S.O. (1914) cc. 82, 83.

But by the Division Courts Act, R.S.O. (1914), c. 63, s. 191, a judgment debtor may be committed for not more than 40 days *or* until payment, if, *having means to pay* he refuses or neglects to pay any debt due in pursuance of the order or judgment of a Court. Such an imprisonment does not however satisfy the debt or deprive the creditor of his right to issue execution, it is a punishment.

Judgment may be given against a defendant by his consent. Formerly this was effected by a *cognovit*, but now a judge's order is obtained by consent authorising the plaintiff to enter up judgment and to issue execution, according to the terms of the order.

A *warrant of attorney* is an authority given by a debtor to his creditor to enter judgment in an action at some future time if the debtor fail to pay.

By Ontario Rule 397 no cognovit actionem or warrant of attorney to confess judgment is of any force.

(*b*) **Recognisances**, *i.e.* obligations entered into before a Court of record or magistrate duly authorised, and conditioned to become effective if the person bound fails to do some acts as *e.g.* where a person is bound over in the sum of $500 to keep the peace.

Specialty debts are those formerly created by deed. They had priority over all debts by simple contract except money owing for arrears of rent. But now specialty and simple contract debts are of the same degree.

A **bond** is an acknowledgment by A of his indebtedness in a certain sum to B. If it contains no more it is called a *single* bond. But bonds usually have a condition annexed that on A doing some specified act they shall become void. Thus a common money bond would bind A to pay $1000 to B subject to a condition that if A paid $500 within three months the bond should be void. The object was merely to secure the prompt payment of the $500. At one time if the condition was unperformed the whole penalty was recoverable, but now the payment of the lesser sum with interest and costs is a satisfaction of the bond.

Where a bond was given for securing performance of any other act the whole penalty became due at common law on breach of any part of the condition.

Later the obligee was required to state or *assign* the breaches, and though he obtained judgment for the full amount of the penalty he could only issue execution for the damages in respect of such breaches.

At common law interest on a debt was not recoverable except (1) under an express agreement to pay it; (2) under an agreement implied from the course of dealing between the parties or a trade usage; (3) where the debt was secured by a bill of exchange or negotiable instrument. By the Judicature Act R.S.O. (1914) c. 56, s. 35, interest is recoverable on all debts (1) if payable by virtue of a written instrument at a certain time, from the time when payable; (2) if otherwise from the time when a written demand of payment has been made giving notice that interest will be charged from the date of demand.

A surety is a person who makes himself liable, together with the principal debtor, for payment of a debt. If he pays he

becor 's a creditor of the principal for the amount and by the Mercantile Law Amendment Act, R.S.O. (1914), c. 133, s. 3, he is entitled to have assigned to him every judgment specialty or security held by the original creditor, whether in law satisfied by payment of the debt or not, and to use all the remedies which the creditor might have used. One of the several sureties who pays the whole debt is entitled to *contribution* from his co-sureties, but if he has received any security from the debtor he must bring it into hotchpot for the benefit of the co-sureties. If one surety is insolvent the others must contribute rateably to payment of the whole debt.

A surety may be discharged if the cre litor gives further time to the principal or releases or compounds with him without expressly reserving the rights against the surety, or if he varies his contract with the principal so as to affect the position of the surety, *Ellesmere Brewery Co.* v. *Cooper*, [1896], 1 Q.B. 75. But he is not discharged by mere neglect of the creditor to enforce payment when due nor by bankruptcy of the principal.

Debts could not formerly be taken in execution. But under the Execution Act, R.S.O. (1914) c. 80, s. 20, the sheriff may seize cheques, bills, notes, bonds, specialties or other securities.

And under the Division Courts Act, R.S.O. (1914) c. 63, the Court may order debts owing or accruing to a debtor to be attached to satisfy a judgment. Such an order is termed a garnishee order and may—on the application of a judgment creditor or his assignee—be made on any person (termed the garnishee) within the jurisdiction who is indebted to the judgment debtor. Service of the order on the garnishee binds the debt in his hands and execution may issue against him, if he fails to pay the sum into Court and does not dispute his liability.

Where a garnishee order is impossible the Court may appoint a receiver of debts due to the bankrupt. If the debtor has money in Court standing to his credit, a charging order can be made.

Discharge of a debt may take place:

(1) By payment by the debtor or his legal representatives or his or their agents to the creditors or his representatives or his or their agent authorised to receive the money. A *tender* of a debt does not discharge it, but if the creditor subsequently sues the debtor will get his costs of action, pro-

vided he has continued ready and willing to pay and has paid the amount tendered into Court.

(2) **By accord and satisfaction**, *i.e.* by the creditor's acceptance, instead of payment of some other valuable consideration. Payment of a smaller sum than the debt is no discharge unless there is some consideration for the release of the balance, such as payment before it is due or by negotiable instrument, or concurrence of the other creditors in accepting a composition.

(3) **By set-off**. If A owes B $50 and B owes A $30, A may if sued by B set off the counter debt of $30, but apart from this debts are not discharged by counter debts except (1) in the case of a current account when only the balance is recoverable; (2) on *administration* in bankruptcy.

(4) **By Release**. A release without consideration is void unless made by deed, except in the case of bills of exchange, but in this case either the release must be in writing or the bill or note must be delivered up to the acceptor or maker.

(5) Under the **Bankruptcy** law.

(6) By the **Statutes of Limitation**, subject to the possibility of renewal.

Appropriation of Payments.—If A, owing B various debts, pays a portion of the total, he may either at the time of payment or after, appropriate it to any of the debts. If he has not done so, the creditor may appropriate it. If neither makes any appropriation the law appropriates it, (1) to any interest due; (2) to the earliest debt.

An insolvent debtor may make a composition with his creditors by which they agree to accept so much in the pound and allow time for payment.

Sometimes in this case a letter of license is given by the creditors in which they covenant not to take proceedings in the meantime and is embodied in a deed of inspectorship, by which inspectors are appointed to watch the winding up of the debtor's affairs.

Sometimes an assignment of the debtor's property is made to trustees for his creditors. This is however an *act of bankruptcy*, though it cannot be taken advantage of as such by a creditor who has concurred in it.

CHAPTER 9.

BANKRUPTCY

THE law of bankruptcy was created by statute and is now contained in the Dominion Bankruptcy Act of 1919, and in the Rules, made under powers given by the Act.

Persons subject to Bankruptcy Laws.—Both traders and non-traders are now liable to be made bankrupts. An alien is liable only if he commits an act of bankruptcy in Canada. A married woman who carries on trade separately from her husband for her separate use is in respect of her separate property liable as if she were a *feme sole*. An infant cannot be made a bankrupt.

Acts of bankruptcy do not necessarily make a man bankrupt, but render him *liable to be adjudged bankrupt*. Such acts are by s. (3):—

(*a*) Any conveyance or assignment of his property to a trustee for the benefit of his creditors *generally*.

(*b*) Any *fraudulent* conveyance, gift or transfer of all or any part of his property.

(*c*) Any conveyance, etc. of or charge upon his property, which might amount to a *fraudulent preference*.

(*d*) Leaving or remaining out of Canada, or leaving his house or keeping out of the way of his creditors *with intent to defeat or delay them*.

(*e*) Seizure of his goods under an execution if the goods are either sold or held by the sheriff for 14 days.

(*f*) Exhibiting to meeting of his creditors a statement of assets and liabilities showing his insolvency.

(*g*) Assigning, removing, or disposing of any of his goods, or attempting so to do, with intent to defraud his creditors.

(*h*) Makes a bulk sale without complying with the provisions of the Provincial Bulk Sales Act.

A conveyance may be fraudulent under the bankruptcy laws though it is not fraudulent under 13 Eliz. c. 5 R.S.O. (1914) c. 105, *Ex p. Games*, 12 Ch.D. 314. An assignment of the whole

or practically the whole of a debtor's property for a *past* debt is, under the bankruptcy law, considered a fraud on the other creditors unless at the same time the debtor obtains a further advance to enable him to carry on business, *Ex p. Johnson*, 26 Ch.D. 338.

Proceedings.—The first step is the bankruptcy petition, which by s. 4 may be presented by a creditor or creditors, but the petition must show that (*a*) the debt or aggregate debts amount to $500, and (*b*) the act on which the petition is founded has occurred within six months.

The Court requires proof of the debt, of service of the petition, and of the act of bankruptcy, and if satisfied may make a receiving order under s. 4 (5).

A debtor may assign for the general benefit of his creditors if his debts exceed $500. (s. 9).

On the making of the receiving order the trustee is constituted receiver of the debtor's property and henceforth no creditor whose debt is provable in bankruptcy can take any proceedings without leave of the Court. But a *secured creditor* may still deal with or release his security (s. 6).

At any time after the presentation of a petition the Court may appoint an authorized trustee as *interim receiver* and may direct him to take immediate possession (s. 5).

A debtor may escape bankruptcy by making a composition or scheme of arrangement, which, if accepted by a majority in number of creditors who hold two-thirds in amount of proved debts, and if approved by the Court, will be binding on all the creditors and will release him from all liabilities provable in bankruptcy. (s. 13).

If however he makes default in carrying out the composition or scheme, or it cannot proceed without injustice or undue delay, or the approval of the Court was obtained by fraud, it may be annulled and he may be adjudged bankrupt. (s. 13 (14)).

A composition or scheme may be approved even after adjudication of bankruptcy, but may be annulled on the same grounds. (s. 13 (18)).

When a debtor is adjudged bankrupt his property becomes divisible among his creditors, and vests in the *trustee* or trustees named in the receiving order. (s. 6). It is then administered

by the trustee under the control of a *committee of inspection* elected by the creditors.

The property divisible under s. 25 does not include (i) property held by the bankrupt on trust for any other person; (ii) exemptions from seizure allowed by the provincial law. It does include (a) all property belonging to him at the commencement of the bankruptcy or acquired before his discharge; (b) the capacity of exercising all powers over property that might be exercised by him for his own benefit.

The trustee may disclaim any land or property of the bankrupt which is subject to onerous covenants or obligations and any unprofitable contracts. The disclaimer determines all interests of the bankrupt and discharges the trustee from personal liability, but does not otherwise affect the rights or liabilities of third persons, who may prove for any damages caused by the disclaimer. A lease may be retained or disclaimed by the trustee. (s. 52 (5)).

The Court may also, on the application of the other contracting party, rescind any contract made with the bankrupt.

The trustee must take possession of all documents and property of the bankrupt. (s. 17). He may transfer any shares, stock, shares in ships, etc., of the bankrupt. Provisions are also made in the Act for the appropriation to the creditors of a portion of any income, salary, half-pay or pension enjoyed by the bankrupt. The trustee, subject to any special directions of the committee of inspection and of the creditors, has power to sell and generally deal with any property of the bankrupt.

He must obtain the *consent* of the committee for certain things, *e.g.* to carry on the bankrupt's business, to maintain any action, to employ a solicitor or other agent, to mortgage or pledge any property and compromise any debts. (s. 20). He may with consent of the committee allow the bankrupt to manage his own business and may make him an allowance for his services. (s. 21).

All money received by the trustee must be deposited in a chartered bank and property of the bankrupt must not be removed from the province. (s. 26). Provisions are also made by the Act for the keeping and auditing of accounts. (s. 23).

The trustee's remuneration for all services shall not exceed 5% of the cash receipts (s. 40).

The money realized on sale of the assets is applied in payment of (1) costs; (2) debts. The first dividend must be declared within six months after the date of the receiving order, subsequent dividends whenever trustee can pay a 10% dividend. No action for a dividend lies against a trustee, but the Court may make an order for him to pay it with interest and costs. (s. 37).

The order of priority of debts in bankruptcy is dealt with in s. 51. The rights of a landlord are covered by s. 52.

Debts Provable The following are not provable: (*a*) unliquidated claims arising otherwise than from contract or breach of trust; (*b*) debts contracted after notice of bankruptcy; (*c*) claims which cannot be valued.

All other debts and liabilities are provable, present of future, certain or contingent; claims of uncertain value must be valued by the trustee. (s. 44).

Where there have been mutual credits, debts or dealings between the bankrupt and any other person only the balance of account can be claimed on either side. (s. 28).

Secured creditors may either (1) rely on their security and not prove, or (2) realise their security and prove for the deficiency, or (3) value their security and receive dividends on the balance, or (4) surrender it and prove for the whole debt. (s. 46).

Relation Back.—The bankruptcy of a person and therefore the title of the trustee to his property is deemed to relate back to and commence at the time of the service of the petition on which the receiving order is made. (s. 46).

But subject to (*a*), (*b*) and (*c*) below the bankruptcy will not avoid any payment made to the bankrupt, or by the bankrupt of his creditors, or any conveyance or contract for valuable consideration, if it is made before the date of the receiving order and the other party has no notice of any available act of bankruptcy committed by the bankrupt:

(*a*) A creditor cannot retain the benefit of an execution against a bankrupt, unless it has been actually paid over before the date of the receiving order. (s. 11). Where a sheriff is retaining the proceeds of sale, and if during that time he has notice of a petition on which a receiving order

is made against a debtor he must pay the balance, after deducting his costs, to the trustee.

(*b*) **A settlement** of property which is not made in consideration of marriage, *or* in favour of a purchaser in good faith, *or* is not a settlement on the wife or children of the settlor of property which accrued to him after marriage in right of his wife is void (i) if he becomes bankrupt within one year; (ii) if he becomes bankrupt within 5 years unless he was at the time of making the settlement solvent without including the property settled, and his interest in the property passed to the trustee of the settlement at the date of its execution. (s. 29).

But the title of a *bona fide* purchaser for value from a beneficiary under a voluntary settlement will not be avoided by the bankruptcy of the settlor. Re *Carter* v. *Kenderdine* [1897], 2 Ch. 776.

Covenants for the future settlement of property to be subsequently acquired by the settler and not being property of or in right of his wife, are void if he becomes bankrupt before it has been actually settled according to the covenant (s. 29 (2)).

(*c*) Any payment or transfer of property made by an insolvent person, with a view of giving a fraudulent preference to any creditor, is void if he becomes bankrupt within six months (ss. 3, 4).

At any time after adjudication of bankruptcy the bankrupt may apply for an order of discharge (s. 58).

The Court hears a report of the official receiver as to his conduct and affairs and may (1) grant or refuse an order of discharge; (2) suspend the operation of the order for a specific time; (3) grant the order subject to conditions as to after acquiring property or earnings. (s. 58).

If the assets will not, except from causes for which the debtor is not responsible, produce 50 cents in the $1 on the unsecured liabilities, or if he has previously been bankrupt or compounded with his creditors, or if he has been guilty of certain acts of misconduct, *e.g.* failing to keep proper books or to account for loss of assets, or rashly speculating or contracting liabilities, then the Court must either refuse a discharge or suspend it until 50

cents in the $1 has been paid, or must require the bankrupt to consent to judgment being entered against him for any balance of the debts, so that they may be paid out of future earnings or property. (ss. 58, 59).

An order of discharge releases the bankrupt from all debts and liabilities provable in bankruptcy, but not from (a) debts due on recognisances or bail bonds or for offences against revenue statutes, except by consent of the Crown; (b) debts or liabilities incurred on which he has obtained forbearance by fraud; (c) liability under a judgment for seduction, or under an affiliation order, or as co-respondent in a matrimonial cause unless the Court orders; (d) any debt or liability for necessaries of life, unless the Court orders. (s. 61).

A receiving order or adjudication may be *annulled* if it ought not to have been made or if the debts are paid in full. (s. 62).

Personal property, including leasehold, acquired by the bankrupt before his discharge does not immediately vest in the trustee, *Re Clayton* v. *Barclay* [1895], 2 Ch. 212 and until the trustee intervenes all transactions by the bankrupt with any person dealing with him in good faith and for value in respect of such property are valid against the trustee, *Cohen* v. *Mitchell*, 25 Q.B.D. 262.

CHAPTER 10.

INSURANCE

A CONTRACT of insurance is a contract to indemnify against a loss which may arise, or to pay on the happening of some event, a sum of money to the person insured. The instrument by which the contract is entered is called a policy of insurance.

Life Insurance.—By the Insurance Act, R.S.O. (1914) c 183, an insurance on the life of any person wherein the assured has no interest is void (s. 169). The name of the person interested therein must be inserted in the policy, and no greater sum can be recovered than the value of the interest of the assured at the date of the policy.

Every person of the full age of 21 years has an unlimited insurable interest in his own life. (s. 171).

A creditor has in insurable interest in his debtor's life and payment by the debtor does not make the policy void. A father has no insurable interest in his son's life.

A policy of life insurance is a chose in action and may be assigned under the Judicature Act, so as to allow the assignee to sue in his own name.

A wife may effect a policy on her own or her husband's life for her separate use; and a policy effected by a man on his own life for the benefit of his wife or children, or by a wife on her life for her husband or children, creates a trust, and the money paid is not subject to the debts of the insured.

Fire insurance is a contract of *indemnity*. The insured cannot recover more than his interest, nor can he, as a rule, assign without the consent of the insurers, the contract usually being personal. On the sale of property which is insured the benefit of the policy does not pass to the purchaser unless expressly assigned.

Marine insurance is also a contract of *indemnity*. The insurer must have an interest in the property insured if it is a British vessel or goods thereon. Contracts of marine insurance must be in the form of a policy. They are assignable to any person entitled to the property assured and as choses in action are assignable under the Judicature Act.

CHAPTER 11.

PERSONAL ANNUITIES, STOCKS AND SHARES

A **personal annuity** is an annual payment not charged on real estate. It may however be limited to A and his heirs, and will then, if A dies intestate, descend to the heirs. But it is *personal property*, and if A by will gives all his personal estate to B, the annuity will be included in the bequest. The public funds are such portions of the public debt as have been *funded* or transferred into perpetual annuities payable as interest on the money advanced; stock in the funds is the right to receive such annuities subject to the right of the Government to redeem at a fixed sum and is personal estate.

The most important Canadian stock is the Victory Loans. This stock is convertible into *stock certificates* payable to bearer and transferable by delivery.

Other personal property of similar nature is Provincial bonds and various Municipal Corporation bonds.

Joint Stock Companies.—A share in a trading company is a right to receive a certain share of its profits, and may entail an obligation to make a certain contribution towards its debts. *Burland* v. *Steel*, [1901], 1 Ch. 280.

Corporations are *legal persons* maintaining continuous existence by a perpetual succession of members. They are (*a*) **sole**—composed of one person, as a bishop; (*b*) **aggregate**—composed of a number of persons acting on important occasions by their common seal. They may exist (1) by common law as when (*a*) created by letters patent, or (*b*) corporations by prescription; (2) by statute. The individual members of a common law corporation are not liable for its debts, but when created by statute a liability may be imposed.

Early in the eighteenth century a number of joint stock companies were formed without charter or statute. These therefore were not corporations, but merely large *partnerships* in which each member was liable for all the debts. In the nineteenth cen-

tury incorporation first became possible by *registration*, but companies formed by letters patent or statute still have special privileges.

In most cases their shares are personal estate, though in some older cases they are real estate.

In Canada all joint stock companies incorporated by special statute are governed by the Canadian Companies Act, save so far as it is excepted by their special Act. Under this Act the capital of the Company is divided into shares, which are personal estate. Certificates are issued to shareholders, which are *prima facie* evidence of their title. Transfer of the shares is by deed, which must be registered. No shareholder can transfer any share not fully paid up until he has paid all calls due on every share held by him. On default of payment of calls shares can be forfeited. A creditor of the Company can issue execution against a shareholder only (1) to the amount unpaid on his shares, and (2) so far as there is not sufficient property of the Company.

Joint Stock Companies which were not incorporated sometimes obtained special Acts enabling them to sue and be sued in the name of some officer, but such Acts always preserved the individual liability of the members.

Limited liability was introduced in England in 1855, the principle is incorporated in the Dominion and all Provincial Companies Acts.

Under the Dominion Act five or more persons may by subscribing to Petition for Letters Patent and a Memorandum of Agreement and fulfilling the requirements in other respect, form an incorporated company with liability of its members limited to the amount unpaid on shares subscribed.

The Petition for Letters Patent must state (1) the name; (2) the situation; (3) the objects of the company; (4) the capital and shares into which it is divided.

It must be accompanied by a Memorandum of Agreement which must be signed by the Petitioners for Letters Patent.

A person who agrees to take shares in a company must pay for the shares allotted to him according to the terms of issue. When they are fully paid up no further liability attaches to the share-

holder. Shares may be paid for either by money or money's worth, but in the latter case shares may not be issued at a *discount*. *Ooregum Co.* v. *Roper*, [1892], A.C. 125.

A person who has agreed to take shares otherwise than by signing the Memorandum does not become a member until registered in the register of members.

A **call** is a demand for payment of any amount left unpaid on a share and on failure to pay the share may be forfeited.

A share certificate is *prima facie* evidence of the shareholder's title.

Shares in companies registered under the Act are personal estate and are transferable according to the Letters Patent or the by-laws of the company. **Share warrants** to *bearer* may be issued in respect of any fully paid-up shares or stock.

Creditors of a company registered under the Act have no direct remedy against the individual shareholders, but the company may be wound up by the Court or voluntarily. Both present and past members are then liable to contribute to payment of debts and costs, but only to the extent of the amount unpaid on their shares.

The liabilities of these *contributories* are enforceable upon calls made by the liquidator with the consent of a *committee of inspection* chosen from the creditors and contributories.

Equitable interests may exist in shares as in other personal property, but a company is not bound to take notice of any trust and is discharged by the receipt of the registered holder.

A debenture is an instrument under the seal of a company whereby the company charges its property with the repayment of borrowed money.

As a rule negotiable instruments cannot be created by deed but by mercantile custom *bearer debentures* are negotiable. *Edelstein* v. *Schuler*, [1902], 2 K.B. 144; *Bechuanaland Co.* v. *London, etc. Bank*, [1898], 2 Q.B. 658.

A floating security is a charge on the assets of the company for the time being, which permits the company to deal with and dispose of its property in the ordinary course of business, but which when it has to be enforced attaches on the *then existing* assets of the company. Debenture stock is a funded debt charged on the assets.

CHAPTER 12.

PATENTS—COPYRIGHTS—TRADE-MARKS

Letters patent is the name of the document by virtue of which the Sovereign grants to the subject an exclusive privilege or franchise, such as a trade monopoly.

The Patent Office in Canada is attached to the Department of Trade and Commerce, and the Minister of Trade and Commerce, for the time being, is the Commissioner of Patents. Patents of inventions are granted by the Crown under the Patent Act, R.S.C. (1906), c. 69, to any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter, not known or use by others before his invention thereof, or not being for more than one year previous to his application in public use, or on sale, in Canada, with the consent or allowance of the inventor.

Subject-matter.—A patent can only be granted for a "*new manufacture*"; it must consist in or relate to the production of something tangible—a mere principle or a scheme such as a new musical notation is not a manufacture. *R.* v. *Wheeler*, (1819) 2 B. & Ald., at p. 349.

It must be "new" *in law*. A manufacture is not considered new in law if it would have required no ingenuity to produce it, having regard to the common general knowledge in the art to which it relates. These two requirements are approached in the courts under the collective phrase "Subject-matter."

The invention must also be novel *in fact, i.e.* it must never have been published before in Canada by prior public user or in a document to which the public have access, for the public having once obtained possession of an invention by any means whatever cannot be deprived of it. *Patterson* v. *Gas Light and Coke Co.*, (1875) L.R. 3 A.C., at p. 244. Prior user does not necessarily mean prior user by the public, but merely implies prior user in a public manner. *Carpenter* v. *Smith*, (1842)

2 M. & W. 304. Prior publication avoids the patent if in any document to which the public have access without concealment. *Harris* v. *Rothwell,* (1887) 4 Rep. Pat. Cas.

Utility.—The invention must be useful in the sense that it will do what the patentee says in the specification it will do. *Lane Fox* v. *Kensington and Knightsbridge Electric Lighting Co.,* (1892) 9 Rep. Pat. Cas., at p. 417.

A patent can only be granted to the "*true and first inventor*" but others may join with him. The phrase includes a person who has seen the invention abroad and has imported it into this realm or to whom the invention has been communicated from some one resident abroad. A grant may be made to the representatives of a deceased inventor within six months of his death.

Application must be made to the Commissioner of Patents, who is in charge of the Patent Office. The applicant may apply for a patent, in which case he must send in a *complete specification* describing the invention and claiming succinctly the monopoly to which he considers himself entitled—or if he has not sufficiently developed his invention to do this, and if he is afraid that some person may get the advantage of him by applying for a patent before he (the inventor) has perfected his invention, he may file a description of such invention in the patent Office (to be there left sealed) with or without plans; and such filing will operate as a caveat, and will entitle him to notice in case anyone else should apply for a patent (s. 46).

The requirements of a complete specification are that it shall fully disclose with the utmost good faith the nature of the invention and the best way known to the patentee of carrying it into effect, and that it shall be sufficient to enable persons skilled in the art to put the invention into practice. *Phillpott* v. *Hanbury,* (1885) 2 Rep. Pat. Cas. at p. 38; *R.* v. *Wheeler,* (1819) 2 B. & Ald., at p. 354; *Weymann* v. *Corcoran,* (1879) L.R. 13 C.D. 67.

When filed the complete specification is examined at the Patent Office and a search is made into novelty in the light of the specifications filed within the preceding fifty years. The patentee may be obliged to amend the specification and strike

out what is old or the grant may be refused. Decisions of the Commissioner are subject to appeal to the Governor-in-Council (s. 19). When accepted the specification is open to public inspection.

The specification may be amended at any time after acceptance by disclaimer, correction or explanation, but the ambit of the monopoly must not be extended nor may subsequently acquired information be inserted. The amended specification stands for all purposes in the place of the original. See. 25, and *see Moser* v. *Marsden*, (1896) 10 Rep. Pat. Cas., at p. 41.

The patent when granted dates from the date of the application or the date of application for provisional protection, as the case may be. No proceedings for infringement can be taken until the patent is granted, and no proceedings can be taken in respect of anything done prior to the acceptance of the complete specification.

The patent gives to the patentee a monopoly of making, using and selling the invention as claimed, and to do either of these things without a license from the patentee is an infringement, which will lay the infringer open to an injunction together with damages or an account of profits.

A patent operates against the Crown, but the State has the right to use the invention and may itself fix the rate of remuneration to be paid to the patentee (s. 52).

Licences may be granted in any form, but those containing agreements to pay royalties must conform to the Statute of Frauds.

Assignments must be under seal, but parol agreement to assign will operate as an equitable assignment and specific performance will be decreed. *Stewart* v. *Casey*, [1892], 1 Ch., at p. 116.

Assignments and licences must be entered in the Register of Patents, and an action lies to amend or expunge entries in the Register at the suit of an aggrieved person. The Register is *prima facie* evidence of the facts stated therein.

Copyright is the exclusive right of multiplying copies of an original work or composition. By the Copyright Act, R.S.C. (1906), c. 70, copyright of every book, picture, drawing, map, chart, etc., holds good for 28 years (s. 4) and may be renewed

for 14 years by the author, his widow or children (s. 19), but in no case shall a copyright exist in Canada after it has expired elsewhere (s. 5). All that is required to obtain a copyright of a book published in Canada is to send three copies of the book to the Department and write a letter in the prescribed form asking for the registration of the copyright. The fee is $1.

In case of copyright in pictures, drawings, sculpture, etc., the filing of a written description is sufficient no copies thereof being required.

Notice of copyright is required to be given on the title page of a book or the page immediately following in the words "Copyright, Canada, 192—, by A. B." (s. 14). There is a penalty of $300 for giving such notice and failing to secure the copyright (s. 4).

Imperial Copyright Act, 1842, was applicable to all parts of the British Dominions and therefore applied to Canada, but in the opinion of the author this Act is a dead letter in Canada at the present time. Since the passing of the B. N. A. Act, 1867, the Imperial Parliament has no more authority to pass legislation relating to Copyright in Canada than it has to pass legislation relating to any other subject mentioned in s. 91 of that Act. See pp. 64-67 Lefroy's Canada's Federal System.

Smiles v. *Belford* (1876) 23 Gr. 590, 1 A.R. 436, is cited as authority that the Imperial Act of 1842 is still in force in Canada. I submit that it is not good law to-day, notwithstanding that it has been followed in several later cases. The Supreme Court of Canada in *Black* v. *Imperial Book Co.*, 35 S.C.R. 488, refused to express an opinion one way or the other as to whether *Smiles* v. *Belford* was rightly decided. Sedgewick, J., says: "It is still open for discussion as to whether the Parliament of Canada having been given exclusive jurisdiction to legislate upon the subject of Copyright, may not, by virtue of that jurisdiction, be able to override Imperial legislation antecedent to the B. N. A. Act."

The author submits that the Parliament of Canada has, within Canada, the exclusive jurisdiction to legislate upon the subject of Copyright, and that if a British author desires to protect his work in Canada he must arrange with a Canadian publisher to bring out a Canadian edition.

Industrial Designs.—By the Trade Mark and Design Act, R.S.C. (1906), c. 71, application may be made for registration of any new and original design for labels, letter heads, etc., not previously used in Canada. The fee for registration is $5 (s. 46), and is good for 5 years and may be renewed for a further 5 years, or less, but for no longer (s. 30). The renewal fee is $2 for each year of the renewal term (s. 46).

General Trade Mark means a trade mark used in connection with the sale of various articles in which a proprietor deals in his trade, business, occupation or calling generally (s. 4a). Such as "White Swan" or "Arm and Hammer Brand." These general trade marks may be registered for $30 (s. 46), and are good for ever (s. 16).

Special Trade Mark means a trade mark used in connection with the sale of a class merchandise of a particular description (s. 4b). Such as "R.R.R.," Radway's Ready Relief, or "Chiclets." These special trade marks may be registered for $25 (s. 46), and are good for 25 years (s. 17). They may be renewed from time to time for a further 25 years (s. 17) on payment of $20 for each renewal (s. 46).

Geographical Names.—No person can acquire the exclusive right to use a geographical name as a trade mark or trade name, say "Ceylon Tea", as every person who sells tea grown in Ceylon has the right to advertise that his tea came from Ceylon, but "Salada Ceylon Tea" is a good trade name which cannot be used by any person except that tea company. The leading Canadian case is *Grand Hotel Co.* v. *Wilson*, C.R. 13 A.C. 223. There the plaintiffs sold mineral water under the name of "Caledonia Water," the name being derived from the name of the township of Caledonia. The defendants sold similar mineral water marked "from new springs at Caledonia." The Privy Council held that the defendants had the right to advertise the source of their water and in doing so they had sufficiently distinguished their goods from those of the plaintiffs.

No person can prevent or recover damages for the infringement of an unregistered trade mark (s. 20).

A registered trademark can be assigned under s. 15.

Trade Names.—Goods of a trader may become known in connection with his name or that of his works or locality without any trademark being registered, *e.g.*, "Angostura Bitters" or "Singer Machines." The same right then exists to prevent "passing off" as in the case of a trademark. See *Reddaway* v. *Banham*, [1896] A.C. 199. . trade name is similarly assignable with the business in connection with which it has been used.

Goodwill is every advantage acquired by carrying on a business whether connected with the premises or the name or reputation of a firm. On dissolution of partnership each partner in the absence of any contrary agreement has the right to use the name of old firm, but where one partner takes over the stock and business at a valuation goodwill must be included.

Sale of a goodwill does not prevent the vendor from setting up a *similar* business, but he may not represent that it is the *same* business as that which he has sold, and he may not canvass customers of the old firm. *Trego* v. *Hunt*, [1896], A.C. 7.

Patents, copyrights, etc., are not directly available in execution, but their benefit passes to a trustee in bankruptcy. They are choses in action and excluded from the doctrine of reputed ownership.

CHAPTER 13.

SETTLEMENTS OF PERSONAL PROPERTY

LAND can be *settled* by giving life estates to some persons with estates in remainder to others after them. But personal property, being the subject of ownership which is absolute and indivisible, cannot be settled by the creation of estates of it. If therefore a chattel be granted to A for life he is entitled to the whole ownership. An exception occurs in the case of a bequest of a term of years to A for life and after his decease to B. Here on A's death the term vests by way of executory bequest in B. During A's life B has no estate, but merely a *possibility* which, however, he can alienate by deed.

In equity however if personalty was given to A for life with remainder to B it was enforced as a trust and B was considered to have a vested interest in remainder. In making a modern settlement of personalty the doctrines of equity are therefore made use of and the property is vested in trustees on trust for A for life and after his decease in trust for B, etc. The trustees get the legal ownership but must pay the interest to A for life, and after his decease in trust for B, and so on according to the trusts of the settlement.

Where shares are settled then any *bonus* (*a*) if paid as dividend belongs to the life tenant, but if paid or dealt with by the company as capital it must be invested and only the income paid to the life tenant. *Re Boach*, 29 Ch. D. 635.

By the *Apportionment Act*, R.S.O. (1914), c. 156, all rents, dividends, and other periodical payments are made apportionable, if therefore a quarterly dividend falls due one month after the death of A, his personal representatives are entitled to one-third and B is entitled to two-thirds. Before the Act apportionment was only possible in a few cases and in all others B would have taken the whole.

The word "heirs" is unnecessary for and inapplicable to a gift of personalty which is not hereditary. A gift of personalty to A simply, without any words of inheritance or succession is sufficient to give him the complete ownership. So also a gift

to A and the heirs of his body gives him the complete ownership since an estate tail cannot either at law or in equity exist in personalty.

It is a common practice to make an assignment of personalty to A "and his executors, administrators, and assigns." But these latter words are unnecessary.

Sometimes, however, personalty is settled on trust for A for life and *after his decease* on trust for his executors, administrators, and assigns. Where these words are used then by analogy to the rule in Shelley's case A is entitled to the absolute ownership.

The rules governing contingent remainders on land do not apply to contingent dispositions of personalty. Thus a gift of land to A for his life and after his death to such son of A as shall first attain 21 creates a contingent remainder which would fail if on A's death no son of A had attained 21. But a gift of personalty, by way of trust, would not fail in such a case but the son would be entitled to it on attaining 21 after the death of A.

Future dispositions of personalty are, however, governed by the Perpetuity Rule, which requires that they shall vest within a life or lives in being and 21 years afterwards. And accumulations of the *income* of personalty are subject to the same rules as that of realty.

Equitable interests may be created in personalty as in realty by means of powers. Thus stock may be vested in trustees on such trusts as B shall appoint and in default of and until appointment on trust for C. Here C has a vested interest subject to be divested by B exercising his power which he may do even in favour of himself. But if B does not exercise his power C is entitled absolutely and will not be subject to any debts incurred by B. But if B exercises his power, by deed without valuable consideration, or by will, in favour of a third person the property appointed will be subject to his debts. *Beyfus* v. *Lawley*, [1903], A.C. 411.

Portions are usually settled on children equally, subject to a power in their parents to alter the division. Formerly unless such a power was *exclusive*, *i.e.* expressly authorized an appointment to some only or to one of the children each must receive

a substantial share or the appointment was *illusory* and void. Now by the Conveyancing and Law of Property Act, R.S.O. (1914), c. 109, s. 27, an appointment of the smallest amount is sufficient, and the appointment is vested even where one is excluded altogether unless this is forbidden by the instrument creating the power.

It is usual to provide that where part of a fund is appointed to any child he shall not share in the unappointed part without bringing into *hotchpot* the part appointed to him.

If a power is given to appoint, among a class of persons, any appointment to a person, not a member of the class, is void.

An appointment by a father in favour of his child must be made strictly for the benefit of the child. If made under any bargain which is for the benefit of the father it is void as a fraud on the power. Thus where the time of appointment is left to the father it is a fraud for him to appoint to an infant child for the sake of being entitled to the fund on the child's death. See *Henty* v. *Wrey*, 21 Ch. D. 332.

In exercising the powers vesting of the shares appointed must not be postponed beyond the limits allowed by the perpetuity rule. In case of *general* powers the time begins to run from the appointment, but in case of *special* powers (*i.e.* those in favour of a class) from the date of the creation of the power and if the interest would have been too remote when inserted in the instrument creating the power it will be too remote when given in exercise of the power.

The Court favours a construction of an instrument which will give a vested right. Thus if a legacy is given to A, to be *payable* when he attains 21, the gift is vested and if A dies under age is payable to his personal representative.

In settling personalty on children it may either (*a*) be vested in each immediately he is born, a proportion, etc., share being divested as others are born, or (*b*) it may be vested only in those who shall attain 21 or if daughters marry. The result is the same in both cases so far as concerns the capital: but in the first case the income belongs to the children at once and is payable for their maintenance, in the second case no interest in the income vests in anyone of these until 21 or marriage.

But by the Infants' Act, R.S.O. (1914), c. 153, whenever property is held on trust for an infant for not less than a life interest, either absolutely or contingently on his attaining 21, or the happening of any event before that time, the trustees may apply the income to his maintenance unless it was in the meantime given to some one else.

This power exists whether or not any other fund exists for their maintenance or any person is bound to maintain them.

Usually in marriage settlements a life interest is given to the father and mother so that no trust for maintenance is required until the death of the survivor, and even if there is an express power for maintenance it ought not, as a rule, to be exercised by the trustees if the father is able to maintain the children.

All trust funds must be invested in the securities authorised by the trust or in those specified in the Trustee Act, R.S.O. (1914), c. 121, ss. 28, 29, in which a trustee may invest unless forbidden.

Whether or no the consent of the persons entitled to income of trust property is required for a change of investments, and whether or no they can request it depends on the terms of the trust.

Sometimes in settlements of personalty trustees are authorised to invest in realty. In such a case it is directed that the land shall be held by the trustees on trust for sale subject to the consent of the life tenant during his life. This trust for sale, according to the rules of Equity, *reconverts* the land back to personalty so that the devolution of the trust property remains unaltered. But if the persons entitled are all *sui juris* and all consent they may elect that the land shall not be sold and may take it as realty.

The Trustee Act, R.S.O. (1914), c. 121, applies to the appointment, and discharge of trustees of personalty as in the case of realty.

The vesting of personalty in a new trustee may also, as in the case of realty be effected (*a*) by a *vesting declaration* in the deed appointing a new trustee or by which a trustee is discharged; (*c*) by a *vesting order* made by the Court where the concurrence of the retiring trustee cannot be obtained or where he is a lunatic.

A vesting declaration is not, however, applicable to shares, stock or other property transferable only in the books of a company or other body, which must be vested in the new trustees by the ordinary methods of transfer.

No trustee may make any profit out of his trust. A solicitor cannot therefore charge for professional trouble unless (*a*) authorised by the instrument creating the trust, *or* (*b*) he has stipulated for payment before accepting office; *or* (*c*) the beneficiary has voluntarily paid with knowledge that he need not. But a trustee may charge all expenses properly incurred and in the event of legal proceedings a solicitor trustee may be employed by the remaining trustees.

A trustee is liable for any loss caused by his breach of trust or even negligence as, *e.g.* where he has invested in unauthorised or improper securities, *Re Whiteley*, 33 Ch.D. 347; 12 A.C. 727, or has by his carelessness given a co-trustee the means or opportunity of committing a breach of trust or investing in unauthorised securities.

By the *Limitations Act*, R.S.O. (1914), c. 75, s. 47, a trustee may set up any statute of limitation except where the claim is founded on any fraud to which he was party or privy or is to recover trust property or its proceeds in his hands or converted by him.

By *The Trustee Act*, *R.S.O.* (1914), c. 121, s. 36, where a trustee commits a breach of trust, at the instigation, request or consent in writing of a beneficiary the interest of the beneficiary may be impounded to indemnify the trustee.

And by s. 37 of the *Trustee Act*, the Court may relieve a trustee from any breach of trust if he has acted honestly *and* reasonably *and* ought fairly to be excused.

Where any doubt arises as to the proper administration of a trust:

(1) Either the trustee or the beneficiary may institute an action for the administration by the Court; *or*

(2) The trustee may pay the trust fund into Court; *or*

(3) Either trustee or beneficiary may apply to the Court by originating summons for the determination of any particular question.

In some marriage settlements a covenant is inserted for the settlement by the wife of her after-acquired property. This, unless the contrary appears, applies only to property acquired during marriage.

By the *Settled Estates Act*, R.S.O. (1914) c. 74, s. 36, a married woman may make or consent or oppose any application whether she is or is not of full age.

A settlement made previously to and in consideration of marriage or made after marriage in pursuance of written articles made before marriage is for valuable consideration. But a contract for future settlement of after-acquired property may be rendered void by bankruptcy.

A **voluntary settlement** (*a*) may be void under the *Fraudulent Conveyances Act*, 13 Eliz. c. 5, R.S.O. (1914) c. 105; (*b*) may be avoided by subsequent bankruptcy.

To create a valid voluntary settlement the settlor must either do everything necessary to effect its legal transfer to a trustee or he must declare himself to be trustee for the proposed beneficiary, or if the chose in action is equitable, as stock standing in the name of a trustee, it may be settled by a direction to the trustee to hold for the new beneficiary, which must under the Statute of Frauds be in writing. An attempted transfer which is incomplete at law will not be enforced in equity as a trust, *Milroy* v. *Lord*, 4 De G.F.J. 264; *Richards* v. *Delbridge*, L.R. 18 Eq. 11; *Jones* v. *Lock*, L.R. 1 Ch. 25. Nor will Equity enforce specific performance of a voluntary agreement to create a trust even though made by deed.

Resulting Trust. If A transfers stock to B without consideration and without any apparent intention of making a gift to B, the equitable interest will *result* back to A.

So also if A purchases stock in the name of B, a trust will result in favour of A unless B were his wife or child or one to whom he stood in *loco parentis*, when a presumption arises that the purchase was an *advancement* to B.

A voluntary settlement when completed is binding on the *settlor* unless a power of revocation has been inserted, which should always be suggested by a solicitor preparing a voluntary settlement. But the Court may set it aside if the settlor did not understand its effect.

If, however, A puts property into the hands of trustees for paying his debts this is termed an illusory trust because since the trust is for his own benefit A may revoke it so long as the creditors remain in ignorance of it, *Johns* v. *James*, 8 Ch.D. 744.

Succession Duties. By the Succession Duty Act, R.S.O. (1914) c. 24, on the death of any person succession duty, varying from 1 per cent. to 5 per cent. of the value of the estate is payable on all reality and personalty passing by the death, whether property which the deceased was entitled to dispose of or property which by his death passed to some other person. It is also payable on a *donatio mortis causa* and on any gift not made *bona fide* within twelve months before death or which *bona fide* possession was not taken by the donor immediately upon the gift.

CHAPTER 14.

JOINT OWNERSHIP AND JOINT LIABILITY

Joint ownership may exist in personal property and is characterised by the four *unities* of *possession, interest, title and time* in the same way as joint tenancies of realty. The right of *survivorship* similarly exists so that the surviving joint owner is entitled to the whole unaffected by the will of the other; hence trustees of personal estate are always made joint owners.

As there are no estates in personalty a joint ownership is created by a gift "to A and B" simply; it is not necessary to make the gift to A and B, their executors, administrators, and assigns.

When a bond or covenant is made to two or more *jointly* all must join in suing on it and a release by one bars all. If, however, each has a separate interest, the covenant is several and each will have a separate cause of action.

In partnership there is no survivorship, the share of a deceased partner vests in his personal representative; choses in action must, however, be sued for by the surviving partner, who is a trustee for the personal representative of the deceased. The same rule applies to realty which is partnership property.

So also when two persons advance money jointly the survivor is considered in equity a trustee for the personal representative of the deceased.

In ownership in common there is only a *unity of possession* and no right of survivorship. It may be created (*a*) by an express conveyance to two or more to hold in common or in case of a will by the use of any words denoting an intention to give to each legatee a distinct interest; (*b*) by severance of a joint ownership caused by the assignment by one joint owner of his share. A tenancy in common cannot however exist in law in a chose in action, though it can in equity.

Where one joint contractor becomes a bankrupt the others can sue and be sued without him.

A partner cannot assign his share *so as to make the assignee a partner in his place*, he can merely assign his interest in the partnership, subject to the rights of the other partners, *i.e.* his share of the profits and in case of dissolution of the assets, R.S.O. (1914) c. 139, s. 5.

Where two or more persons are *jointly* liable as debtors each one is liable for the whole debt, but they must all be sued together during their joint lives for a judgment against one only will discharge the rest, *Kendall* v. *Hamilton*, 4 A.C. 504. So also will a release of one.

But if one becomes bankrupt and is discharged the order of discharge will not release the others.

Judgment against two or more jointly may be executed against all or one. If one pays the whole he is entitled to *contribution* from the others except in a case of tort. After the decease of one only the survivors can be sued. Also if judgment has been obtained and one dies execution is only possible against the survivor.

A liability may be expressed to be *joint and several*. Each debtor is then individually liable and may be sued alone. Or all may be sued jointly. A release of one will release all unless the creditor expressly reserves his rights against the rest. The estate of one is not, however, discharged by his death.

No co-debtor loses the benefit of the Statute of Limitations by an acknowledgment, promise to pay, or payment by one of his co-debtors.

In the case of partners the liability is *joint* during their lives, but after the death of a partner his estate is *severally* liable. But his separate creditors must be paid in full out of his separate estate before it can be applied to partnership debts.

When a partnership is *bankrupt* the joint assets of the firm are applicable first to the joint debts, and the separate assets of the partners to their separate debts.

And no partner can prove against the firm until the other creditors of the firm are paid.

Bankruptcy proceedings may be taken and a receiving order may be made against partners in the name of the firm, but the adjudication order is made against the partners individually.

A petition may be presented against one or more partners without including the others. But where one is adjudged

bankrupt a joint creditor cannot receive any dividend out of his estate separate until his separate creditors have been paid. But if a person is a joint creditor and also a several creditor he may receive dividends from both the joint and separate estates.

A person who is not in fact a partner may incur the liability of a partner by allowing himself to be held out as a partner, *e.g.* by allowing the use of his name. So also where a person is known to be a partner his liability will continue even after his retirement from the firm unless he gives notice that he has ceased to be a partner. But the use of his name after his death will not make his estate liable.

Where persons enter into an agreement that a business shall be carried on by some or one under an agreement, which gives all of them the *advantages* of partnership, then all of them will incur all the *liabilities* of partnership though the business is carried on in the name of some or one only, and though the agreement limits the liability of some.

To create a partnership there must be a *business* carried on *in common with a view of profit.* Joint ownership or the sharing of *gross* returns either alone or together do not make a partnership. Sharing profits of a business is *evidence* of partnership, but does not of itself make partnership. In particular partnership is not constituted merely by (1) the receipt of a debt out of the accruing profits of a business; (2) payment for services by a share of the profits; (3) payment of a portion of profits as an annuity to a widow or child of a deceased partner; (4) advance of a loan to be repaid by a share of the profits (provided the contract is in writing); (5) sale of a goodwill to be paid for by a share of profits. But in (4) and (5) if the lender or purchaser is bankrupt or dies insolvent the other creditors for valuable consideration are paid first. R.S.O. (1914) c. 138, s. 17.

Every partner is an agent of the firm and of the other partners for the purpose of carrying on in the *usual* way the *ordinary* business of the firm; and no agreement between partners limiting the ostensible authority of one has any effect as regards persons unaware of it. But no partner is an agent for matters outside the ordinary conduct of the firm's business unless he has express authority to act.

Every partner is also liable jointly and severally for the wrongful act or omission of any other partner acting in the ordinary course of the firm's business or by *express* authority.

Limited Partnership.—The foregoing rules have been modified by the *Limited Partnership Act*, R.S.O. (1914) c. 138, under which a firm may consist of (*a*) general partners; (*b*) limited partners, who are not liable for the debts and liabilities of the firm beyond the amount of capital contributed by them. All limited partnerships must be registered. A limited partner may not take any part in the management of the business and has no power to bind the firm. He may however by consent of the general partners assign his share so as to make his assignee a limited partner.

CHAPTER 15.

WILLS

At common law a man who had wife and children could not by his will deprive them of more than one-third of his personalty. But if he left either no wife or no children he could dispose of half. This rule was however subject to exceptions by local custom.

Now by the *Wills Act*, R.S.O (1914) c. 120, every person of full age can dispose by will of all his personalty, legal or equitable. But except in the case of soldiers on active service and sailors at sea no will by a person under twenty-one is valid.

A will of personal property might formerly be *nuncupative*, *i.e.* made by word of mouth before sufficient witnesses. Now, by the Wills Act, every will must be in writing, signed at the foot or end by the testator or some other person in his presence and by his direction. The signature must be made *or* acknowledged by the testator before two or more witnesses present at the same time. The witnesses must attest and subscribe the will in the presence of the testator (s. 12).

But wills of soldiers on active service or of seamen at sea may still be made by unattested writing or by word of mouth before witnesses. (s. 14).

The wills of seamen in the navy, of marines and of merchant seamen must however so far as they relate to wages, prize money, etc., be made with special formalities.

No will or codicil can be revoked except by the marriage of the testator or by another will or codicil, or a written revocation executed as a will, or the destruction or tearing of the will by the testator or by some other in his presence and by his direction *with intent to revoke it.*

Succession to personal chattels is governed by the law of the *domicile* of the deceased; succession to land—including leasehold—by the law of the country where it is situated.

Wills of aliens who leave personalty in Canada must be made in accordance with the law of their domicile unless they devise

leasehold land in Canada, when the will must be in accordance with law of the province in which the land is situate.

Wills of personalty made by Canadians *out of* Canada may be made (1) according to the law of the place where made; (2) or where the testator was domiciled; or (3) where he had his domicile of origin. If made *within* Canada they are valid if made according to the law of the province in which they are made. (s. 20). And no will is revoked or has its construction altered by a subsequent change of domicile.

A *donatio mortis causa* is a gift made in contemplation of death and intended to be absolute only in case of the death of the donor. There must be an actual delivery of the gift or the means of obtaining it, *e.g.* keys of a box, or in case of a chose in action of the document which evidences it, *e.g.* a policy of insurance or a banker's deposit note.

But the delivery of a cheque *drawn* by the donor is not sufficient unless it is cashed in the life of the donor.

The gift is revocable by the donor and after his death is subject to his debts and to succession duty.

Formerly the appointment of an executor was only essential to a will of personalty, since land which was devised passed at once to the devisee.

The executor is entitled to all the personalty of the testator, which after payment of debts he is bound to apply as the will directs. Property bequeathed does not belong to the legatee until the executor has given his *assent*, which he must not give until he knows that there is sufficient to pay his debts without having recourse to the property so bequeathed. Real estate also vests in the executor and his assent is necessary for a devise of realty.

If the sole executor is an infant, administration *durante minore aetate* is granted to his guardian or some person approved by the Court.

A married woman may be appointed executrix without the consent of her husband and by the Married Women's Property Act can act entirely as if she were a *feme sole*.

If an executor dies without having completed administration his executor is entitled to and must complete it.

Co-executors are regarded as one person, and any one may perform all ordinary acts of administration. But all must join in bringing actions. If therefore the testator appoints his debtor to be executor this is at law a release of the debt, but the debtor is bound in equity to account for his debt.

On the decease of one co-executor the office survives to the rest, on the decease of the last or of a sole executor it devolves on his executor.

A person who not being appointed acts as executor is termed an executor *de son tort* and has all the liabilities but not of the rights of an executor. He cannot therefore retain a debt due to him.

Where the attestation clause expresses that the forms of the Wills Act have been complied with and the validity of the will is not disputed it is proved by the simple oath of the executor. But if the attestation clause is omitted or does not express that the proper formalities were complied with, an affidavit is required from one of the attesting witnesses that the will was properly executed. (s. 12).

A person appointed executor may, if he has not intermeddled with the estate, decline the office and renounce probate. His rights then wholly cease and the administration devolves as if he had never been appointed.

Succession duty is payable by the executor or administrator on delivery of the affidavit necessary to obtain probate or administration. Penalties are imposed on any person who administers without obtaining probate or administration within six months after the death.

When the will is proved it is the duty of the executor to pay the funeral and testamentary expenses and for this he has full powers of disposition over the estate. A purchaser is not bound to inquire if any debts remain unpaid or to see to the application of the purchase-money.

Where any questions arise as to the proper method of administration the executor is entitled to the assistance of the Court. Formerly he was obliged to commence a suit for administration by the Court of Chancery. And such a suit might also be commenced by a creditor or legatee or person entitled in intestacy. Now an order for administration may be obtained either in an

action or upon an *originating summons* taken out by an executor or administrator or creditor or legatee or next of kin. And an originating summons may also be taken out by any of the above to determine any one or more questions without an administration by the Court.

When the debts are paid the legacies must be discharged. For this an execution is allowed one year. Even after the year an executor is liable to a creditor to the amount of the assets which have come to his hands, and he can therefore compel a legatee to refund money paid in ignorance of the debt. Where however an executor gives the same notices as the Court would have given in an administration action to creditors to send in their claims, he may distribute the assets without being personally liable for any claim of which he had no notice, but the right of a creditor to follow the assets into the hands of the legatees is not prejudiced.

Where a legacy is given to an infant or a person who is absent beyond seas an executor can only obtain a discharge by paying it into Court.

A specific legacy is a bequest of a specific part of the testator's personalty, *e.g.* some particular thing or fund, *e.g.* my $100 Victory Bond. It must be paid in preference to general legacies and must not be sold for or applied to payment of debts until the general assets are exhausted. But it is liable to *ademption*, *i.e.* the legatee will lose all benefit if the testator parts with it in his lifetime.

A demonstrative legacy is a gift of a certain sum *out of* a particular fund, *e.g.* $500 out of my $1,000 Victory Bond, but if the fund has ceased to exist it is payable out of the general assets. While the fund exists it is not liable to abatement with the general legacies.

General legacies are those payable out of the general assets of the testator and on a deficiency of assets are liable to *abatement*.

A legacy given to a creditor is deemed to be given in satisfaction of the debt if equal to or greater than the amount of the debt. But not if it is less or payable at a different time, or if the debt was contracted after the making of the will or if the

will contains a direction for payment of debts. The Court leans against holding a legacy to be a satisfaction of a debt.

But where a parent has undertaken to pay a sum of money to a child as a portion the Court leans against double portions and inclines to consider a legacy to the child as a complete or partial *satisfaction* of the obligation to pay the portion and though the legacy is less in amount or payable at a different time.

So also if a parent makes a gift by will to a child and subsequently in his life makes a gift to the child, the presumption is that this is an *advancement* or an *ademption* wholly or in part of the amount bequeathed.

By various Mortmain Acts any assurance of land or personalty to be laid out in the purchase of land for charitable uses was with certain exceptions void unless made by deed and in compliance with the conditions of the Acts. Now by the *Mortmain and Charitable Uses Act*, R.S.O. (1914) c. 103, these restrictions are removed and land may be given by will to a charity, but with some exceptions must be sold by the charity. Also gifts of personalty to be laid out in land are no longer void, but the direction to invest in land must be disregarded.

If a legacy is devoted to charity, but cannot be applied exactly as the testator has directed, the Court will execute his intent *cy-pres*, *i.e.* as nearly as possible.

The term *child* in a will does not include illegitimate children unless (1) the terms of the gift are such that legitimate children could not take; or (2) the illegitimate children are clearly identified; or (3) they have acquired the reputation of being children of the testator or any other person, and the will shows an intent to include them.

But an illegitimate child begotten after the death of the testator can never take after payment of debts and legacies, the balance must be paid to the *residuary legatee*. A will takes effect from the death of the testator unless a contrary intention is expressed; it will therefore pass property acquired by the testator after it was made.

Any legacy which lapses by the death of a legatee during the life of the testator or fails from being contrary to law goes to the residuary legatee. But no lapse occurs in the case of a

legacy (*a*) to two or more persons as *joint tenants* or as a *class*; (*b*) where a gift of more than a mere life interest is made to a child or other issue of the testator who dies in the lifetime of the testator leaving issue living at the death of the testator, Wills Act, R.S.O. (1914) c. 120, s. 37. Here unless a contrary intent appears in the will, the gift takes effect as if the original legatee had died immediately after the testator and may pass under *his* will. This rule does not apply to gifts to a class. If a bequest of residue lapses the property devolves as upon an intestacy.

CHAPTER 16.

INTESTACY

The powers of an administrator are the same as those of an executor and *relate back* to the time of the death. He has also the same duty of paying debts and the same protection; also the same powers of applying to the Court for assistance, and the same right of preferring one creditor, and except when he takes out administration as a creditor of retaining a debt due to himself.

After payment of debts the surplus is distributed among the persons entitled according to the Statute of Distributions. The administrator is allowed a year for making distribution, but the interest of the persons entitled vests immediately upon the death.

Limited administration may be granted (*a*)*durante minore aetate*, in case of the minority of the next of kin; (*b*) *durante absentia* in the absence of an executor or of the next of kin; (*c*) *pendente lite*—when an action is pending concerning the administration; (*d*) *cum testamento annexo*, when there is no executor to a will or he has renounced or died before the testator.

The office of administrator is not transmissible, and on the decease of an administrator before the conclusion of the administration or on the death of an executor intestate an administrator must be appointed *de bonis non administratis*.

The application of an intestate's effects is generally regulated by the law of the country in which he was domiciled. But the succession to land is governed by the law of the country where it is situated, and therefore leasehold in Canada devolves according to the law of the province.

The distribution of personalty is governed thus according to the Devolution of Estates Act, R.S.O. (1914) c 119.

CHAPTER 17.

MUTUAL RIGHTS OF HUSBAND AND WIFE

In ancient times the wife was entitled to a provision out of the lands of her husband in case she survived him, but there was no such provision with regard to chattels, except the proviso of early law that he could not bequeath more than a certain part away from her and his children.

A husband was absolutely entitled to the personal chattels of his wife who, as a *feme covert*, was considered to be one person with her husband. The wife had no capacity to acquire or exercise rights over personalty during marriage, and the husband was entitled to all personalty acquired by her which was in possession or was reduced into possession by him.

He might authorise his wife to dispose of her property by will, which was valid if he allowed it to be proved, but until probate he might revoke the authority.

He might dispose of her chattels as he pleased during his life or by his will, and they were subject to his debts. If he died intestate she had no more claim to them than to any other effects.

The only exceptions were paraphernalia, *i.e.* apparel and ornaments suitable to her condition, and gifts of jewels, etc., made by her husband. These might be disposed of by the husband during his life, and except for necessary clothing were subject to his debts. But he could not dispose of them by will. The wife could not dispose of them by gift or will during her husband's life.

The choses in action of the wife vested in the husband if reduced into possession by him during coverture.

If he died first she became entitled by survivorship to choses in action not reduced into possession by him. If she died first he must take out letters of administration before he could recover them, and he was bound to satisfy her debts out of them.

In the case of *equitable* choses in action the husband could not obtain the aid of the Court of Chancery in recovering them unless he settled a certain proportion on the wife and children. This right of the wife was termed her equity to a settlement.

If the husband assigned an equitable chose in action or became bankrupt his assignee or the trustee in bankruptcy took subject in general to the wife's equity to a settlement. If he died before the assignee got possession of the fund, leaving his wife surviving, her title by survivorship prevailed over that of the assignee or trustee. If the wife was entitled to a reversionary chose in action she could not assign it, but owing to her right of survivorship an assignment by her husband had no effect if he died before her and without having reduced it into possession. And even if it vested during the husband's life the assignee took subject to the wife's equity to a settlement. But if the wife died first the husband took as executor and was bound by his assignment, but the assignee took subject to the wife's debts.

By Malins' Act, 1857, a wife might with the concurrence of her husband dispose by deed of every future or reversionary interest in any personal estate to which she was entitled under any instrument except her marriage settlement, made after 1857, and might also release her equity to a settlement out of her personal estate in possession under any such instrument.

If a wife after her engagement to marry assigned away any of her property without the consent of her husband the assignment was void, as a fraud on his marital rights.

Wife's Separate Estate in Equity.—In equity a wife might enforce a trust imposed on any person to hold property for her *separate use*. With respect to this separate estate she was considered as a *feme sole* and she might dispose of her equitable interest therein without her husband's concurrence either in her life or by will. But if she died intestate in the life of her husband he took it in his marital right if the property were in possession or as her administrator if it were in action. In case of a gift of income for a wife's separate use a form of gift is commonly used which was first invented a little more than a hundred years ago, forbidding her from disposing it by anticipation.

The effect of such a restraint on anticipation is to prevent a wife from disposing *during marriage* of anything but income actually in her hands or due to her. On widowhood the restraint ceases, but revives again on a second marriage unless confined to her first marriage.

Under s. 39 of the Conveyancing Act, 1881, a married woman may, if it is for her benefit, obtain an order of the Court removing the restraint. At Common Law a married woman was in general incapable of binding herself by contract, but in equity she could bind any separate estate to which she was entitled without restraint on anticipation.

Powers of appointment might always be given to married women enabling them to dispose of property without their husband's concurrence.

Marriage Settlements.—In modern times when it was desired to settle property on an intended wife this was effected by the rules of equity, which enabled interests for life and in remainder to be granted in personal property placed in the hands of trustees and enforced trusts for married women. The personal property was transferred to trustees on trust for investment and to pay the income for the separate use of the wife during marriage without power of anticipation.

After the determination of the coverture the income was usually given in trust for the survivor, and after death of the survivor in trust for the children in such shares as the parents or survivor should appoint, and in default of appointment in equal shares.

In default of children any personalty settled on the part of the wife was usually given to her absolutely if she should survive, but if the husband should survive then on trust as she should by will appoint, and in default of appointment on trust for the next of kin.

Property settled on the part of the husband was usually limited on trust for himself for life, then to his wife for life if she survived, with remainder to the children as above, and in default of children to the husband absolutely.

Under the Infants' Settlement Act, 1855, every male not under 20 and female not under 17 can make a binding settlement with the sanction of the Chancery Division.

By the *Married Women's Property Act*, R.S.O. (1914) c. 149, s. 4, a married woman is capable of acquiring, holding and disposing of any property as a *feme sole* without the intervention of a trustee.

By the same sec. a married woman is capable of rendering herself liable *to the extent of her separate property* on any contract and of suing and being sued in contract or tort as if she were a *feme sole*, and her husband need not be joined as plaintiff or defendant.

But she is only liable to the extent of her separate propery, not personally.

Execution can only issue against her separate property not restrained from anticipation, *Scott* v. *Morley*, 20 Q.B.D. 120.

Husband's Liability at Common Law.—A husband might be sued jointly with his wife during the marriage on all her ante-nuptial contracts and all her torts committed before or during marriage. But if judgment was not obtained against him during marriage his liability ceased except as to the extent of the assets which he took as her administrator. If the wife survived she became solely liable.

The Married Women's Property Act, R.S.O. (1914) c. 149, s. 18, a husband is liable *jointly* with his wife for her ante-nuptial debts or torts, and for all torts committed after marriage, but only to the extent of any assets which he has acquired in right of his wife.

Liabilities for Wife's Contracts during Marriage.

(1) While they are living together the husband is liable on all contracts entered into by the wife as his agent. Whether she had authority to act as such is a question of fact for a jury. The authority may be either (*a*) express or (*b*) implied.

There is a presumption that a wife has her husband's authority to pledge his credit for necessaries, but he may rebut it by proving that he forbade her to pledge his credit or that she was sufficiently supplied with necessaries or money.

If he has held her out as his agent he cannot revoke her authority without giving special notice.

(2) When they are living apart the wife has no implied authority unless she was compelled to leave her husband by his own fault, when she has implied authority to pledge his credit for necessaries unless he supplies her with necessaries or she has sufficient means of her own. If the separation is by the wife's fault she has not implied authority. If the separation is by

mutual consent she has no implied authority, if she is paid an adequate allowance or the allowance which she has agreed to accept.

Decrees obtainable in a matrimonial cause are (1) for restitution of conjugal rights; (2) for nullity of marriage; (3) for judicial separation; (4) for divorce.

On application for judicial separation by a wife the Court may make an order for alimony, *i.e.* an allowance to be paid by the husband. Alimony is not assignable by the wife nor liable for her debts.

A wife judicially separated is in the position of a *feme sole* with regard to (*a*) any property subsequently acquired by her and (*b*) for the purposes of contract and torts and suing or being sued in any civil proceeding. And her husband incurs no liability for her contracts or torts, but where he fails to pay alimony he is liable for necessaries supplied to her.

A wife deserted by her husband may obtain a protection order to protect any subsequently acquired earnings or property, and is in the same position as if she had obtained a judicial separation.

If a husband had been convicted of a serious assault on his wife, or has deserted her, or is a habitual drunkard, or if she has been forced to leave him through his cruelty or neglect to maintain her, she may maintain from a Court of Summary Jurisdiction an order that she is no longer bound to cohabit with him, which has the same effect as a decree for judicial separation.

Divorce may be granted by the Parliament of Canada for any cause and in the provinces having divorce courts it may be granted (*a*) on adultery of the wife; (*b*) on adultery with cruelty or desertion by the husband. The decree is in the first instance granted *nisi* and not made *absolute* before six months. When the decree has been made absolute the parties may marry again and all rights which they may enjoy in each other's property cease, except those derived under a settlement. The Court may however on a decree for nullity or dissolution make an order varying a settlement.

It may also on dissolution order the husband to secure to the wife a gross or annual sum of money or to pay a weekly or monthly sum for her maintenance. And if divorce or judicial

separation takes place for the wife's adultery it may order a settlement of her property to be made for the innocent party and the children or either.

When a wife applies for restitution of conjugal rights the Court may order that if not complied with the husband shall make to the wife such periodical payments as may be just and may order them to be secured by the husband.

When the application is made by the husband the Court may order a settlement of the wife's property not restrained from anticipation to be made for the benefit of the husband and for the children. An agreement for an immediate separation between husband and wife is valid, but not one providing for the event of a future separation.

CHAPTER 18.

TITLE

A PERSON who acquires goods by *original* acquisition obtains a valid title against all the world.

Where the acquisition is *derivative* the general rule is that no person can transfer a better title to property than he has himself. Thus if A find or steal a watch and sell it to B, B, however innocently he act, cannot retain it against the true owner nor claim to hold it until he has been paid the price.

This rule applies to all goods but not money or negotiable securities.

It applies equally when goods are transferred by act of law, thus an executor or trustee can have no greater right than his testator or bankrupt.

The chief exceptions to this common law rule are:

(1) Where goods are sold in market overt the buyer acquires a good title provided he buys in good faith and without notice of any defect or want of title on the part of the seller. There is no market overt in Canada.

(2) Money and negotiable securities, the property in which is acquired by a holder in due course.

(3) When the seller of goods has a voidable title but his title has not been actually avoided at the time of sale the buyer acquires a good title if he buys in good faith and without notice of the seller's defect of title.

(4) By estoppel, *i.e.* where a person so acts as to induce the belief that another was owner or had power to dispose of his goods he will be estopped or precluded from denying his representations and recovering the goods from a person who has acquires them for value under such belief.

(5) If the goods are in a foreign country, by any transaction valid by the laws of that country which confers a title to the

(6) By indorsement and delivery of the bill of lading to a person who takes in good faith and for value.

goods valid against all the world.

(7) Under the Factors Act, R.S.O. (1914), c. 137, s. 3, where a mercantile agent who, with the consent of the owner, is in possession of the goods or the documents of title to goods disposes of them in *the ordinary course of his business* to a person who takes in good faith and without notice that the mercantile agent is exceeding his authority.

Restrictive conditions cannot in general be annexed to goods. Thus if A sells goods to B with a stipulation that B shall not resell below a certain price or shall observe any other conditions, such a stipulation will not affect a purchaser from B.

But where a chattel is the subject of a patent restrictive conditions can be annexed thereto, where a patentee grants a license to sell or use it, and will bind a purchaser from the license.

In a contract of sale unless the circumstances of the contract are such as to show a different intention, there is:

(1) An implied condition on the part of the seller that in the case of a sale he has a *right to sell* the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy *quiet possession* of the goods.

(3) An implied warranty that the goods shall be *free from any charge or encumbrance* in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Where there is a contract for the sale of goods *by description* there is an implied condition that the goods shall correspond with the description, and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the *quality* or *fitness for any particular purpose* of goods supplied under a contract of sale except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's

skill or judgment, *and* the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition, that the goods shall be reasonably fit for such purpose, *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K.B. 608; *Priest* v. *Last*, [1903] 2 K.B. 148, *provided that* in the case of a contract for the sale of a specified article under the patent or other trade name, there is no other implied condition as to its fitness for any *particular* purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality, *Wrenn* v. *Holt*, [1903] 1 K.B. 610; *provided* that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Where goods are sold to which a trademark or trade description has been applied there is an implied warranty that it is genuine unless the contrary is expressed in a written memorandum signed by the vendor at the time of sale.

Statutes of Limitations. R.S.O. (1914) c. 75, s. 49, provides that the following actions shall be commenced within and not after the time respectively hereinafter mentioned.

(a) An action for *rent*, upon an indenture of demise;

(b) An action upon a *bond*, or other specialty, except upon a covenant contained in an indenture of *mortgage* made on or after the 1st day of July, 1894;

(c) An action upon a *recognizance;*

within *twenty years* after the cause of action arose;

(d) An action upon an *award* where the submission is not by specialty;

(e) An action for an *escape;*

(f) An action for *money levied on execution;*

(g) An action for *trespass* to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of *rent*, *detinue*, *replevin*, or upon the case other than for *slander;*

within *six years* after the cause of action arose;

(h) An action for a *penalty*, damages, or a sum of money given by any statute to the Crown or the party aggrieved within two years after the cause of action arose;

(i) An *action upon the case* for words within *two years* after the words spoken;

(j) An action for *assault*, *battery*, *wounding or imprisonment* within *four years* after the cause of action arose;

(k) An action upon a covenant contained in an indenture of *mortgage*, made on or after the 1st day of July, 1894, within *ten years* after the cause of action arose;

(l) An action for a *penalty* imposed by any statute brought by any informer suing for himself alone, or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within *one year* after the cause of action arose;

(2) Nothing in this section shall extend to any action where the time for bringing the action is by any statute specially limited. And s. 50 provides that "*Every action of account*, or for not accounting, or for such accounts as concerns the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of the action."

On the death of a creditor the time continues to run without interruption if the cause of action accrued in his lifetime. But if the cause of action accrued after his death time begins to run only from the grant of letters of administration.

The death of the debtor does not cause the time to stop running.

The Statutes of Limitation only bar the right of action and do not extinguish the debt. An executor may therefore pay a statute-barred debt, unless it has been judicially declared to be statute barred.

If a testator charges his real estate with payment of his debts, the charge becomes barred in 10 years. If he creates an express trust for payment of his debts out of his real estate it will now be barred also in 10 years (s. 24).

When a chose in action is transferred from A to B, B should give notice to the person liable, *i.e.* in case of a debt to a debtor, otherwise his rights may be defeated by A making a subsequent assignment of the same chose in action to C, who gives notice before him.

If the chose in action be stock standing in the name of a trustee notice should be given to him, and if more than one to all.

Until notice the chose in action remains in the apparent possession of A, and if it is a debt due to him in the course of his trade or business will on his bankruptcy pass to his trustee as being in his reputed ownership.

A trustee in bankruptcy does not complete his title to the choses in action of the bankrupt until he gives notice to the debtor and until then may be defeated by an assignment by the bankrupt.

If the property is money, stock or securities in Court a stop order should be obtained restraining transfer or payment without notice to the assignee.

On a transfer of shares in incorporated companies notice to the company is necessary to complete the assignment. A transfer of shares is not complete at law until registered. Equitable assignments may however be made and in general have priority according to the date of their creation. But if an equitable assignee gets the legal estate without notice of any prior equity he will have priority over a prior equitable assignee.

CANADIAN BANKRUPTCY ACT (1919), being 9-10 Geo. V., chapter 36. Copiously indexed by Walter E. Lear, of Osgoode Hall, Barrister-at-Law. Provincial Acts respecting Assignments and Preferences are superceded by this Act on 1st July, 1920. **PRICE, $1.50.**

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